TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905.

No. 158.

THE NEWBURYPORT WATER COMPANY, APPELLANT,

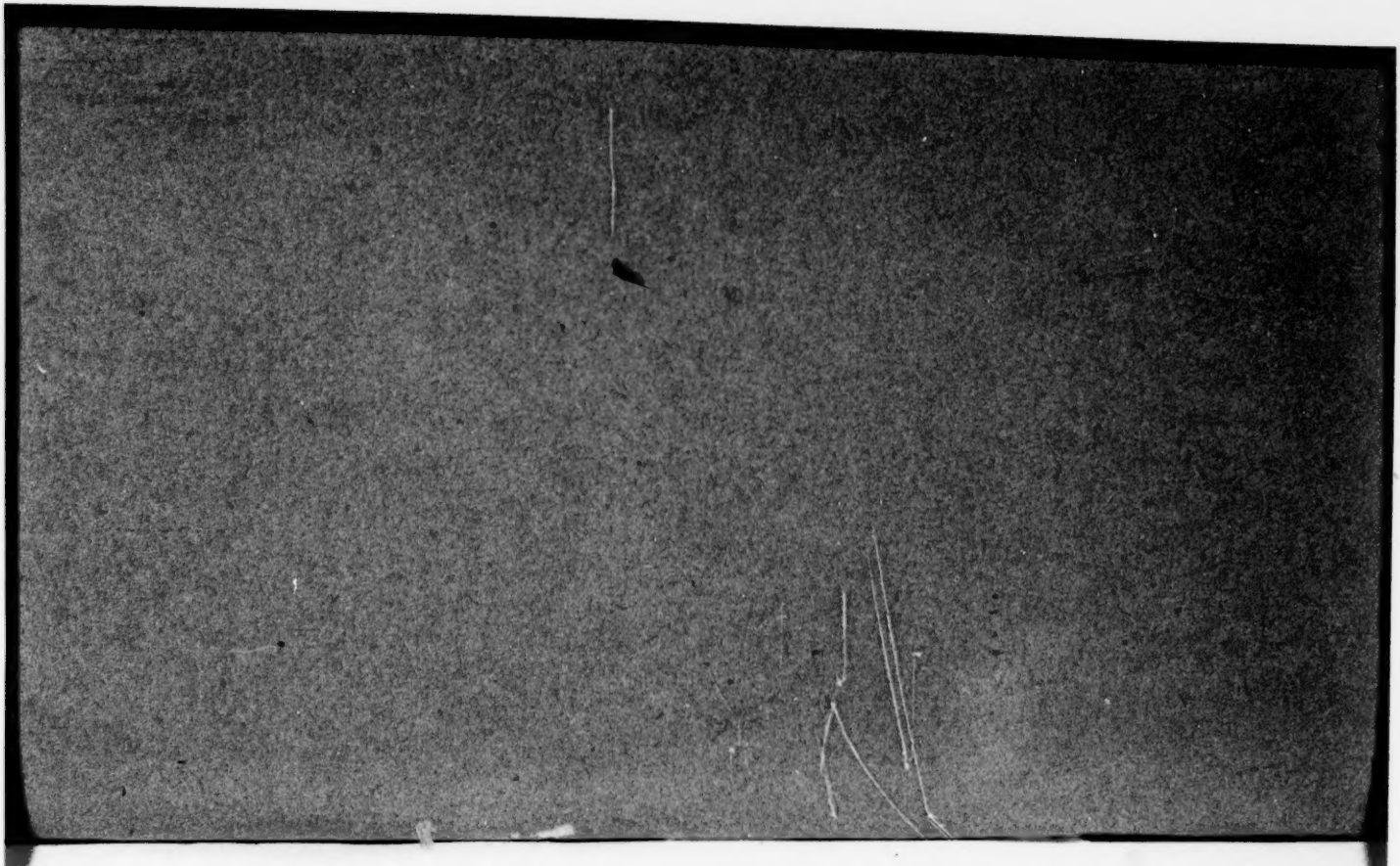
vs.

THE CITY OF NEWBURYPORT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED JANUARY 8, 1906.

(18,770.)



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a Circuit Court of the United States, District of Massachusetts.
In Equity.

NEWBURYPORT WATER COMPANY, Complainant,
v.
CITY OF NEWBURYPORT, Defendant. } No. 924.

Transcript of Record.

1 Circuit Court of the United States, District of Massachusetts.
In Equity.

NEWBURYPORT WATER COMPANY
v.
CITY OF NEWBURYPORT. } No. 924.

Bill of Complaint.

(Filed July 21, 1897.)

To the judges of the circuit court of the United States for the district of Massachusetts:

The Newburyport Water Company, a corporation duly established under the laws of the Commonwealth of Massachusetts, and located therein, brings this bill of complaint against the City of Newburyport, a municipal corporation duly established under the laws of said Commonwealth, and located in the county of Essex in said Commonwealth.

And thereupon your orator complains and says:

1. Your orator, The Newburyport Water Company, is a corporation duly established and existing under and by virtue of the provision of an act of the general court of Massachusetts entitled "An act to incorporate the Newburyport Water Company, approved April 23, 1880, and constituting chapter 235 of the Acts and Resolves passed by the general court of Massachusetts in the year 1880, a copy of which act, marked "Exhibit A," is hereto annexed and made part hereof.

2. The defendant, The City of Newburyport, is a municipal
2 corporation duly established by and under chapter 296 of the Acts of said general court in the year 1851.

3. On information and belief that in the year 1874, defendant, the said City of Newburyport, by a vote of its citizens, declined to ask for legislation authorizing a system of water supply for said city; that in 1878 (chapter 240) an act was passed by said general court which authorized the city to take a supply of water and to build a plant for the distribution of water, which act required for its acceptance a two-thirds vote of the voters present and voting in said city

of Newburyport. A vote was had thereon, resulting in the failure to accept said act.

A copy of said act of 1878, marked "Exhibit B," is hereto annexed and made part hereof.

That said act of 1878 (chapter 240) was continued in force by an act of the said general court, passed in 1879 (chapter 240), a copy of which last mentioned act, marked "Exhibit C," is hereto annexed and made part hereof.

On information and belief that the incorporators of said act of 1880, prior to the passage of said act, petitioned said general court for the passage of such act, and, while such petition was pending, the following order relating to said petition was adopted by said city:

"CITY OF NEWBURYPORT.
IN COMMON COUNCIL, *March* 8, 1880.

Ordered, the mayor and aldermen concurring, that his honor the mayor, for and in behalf of the city of Newburyport, be and is hereby authorized and instructed to sign in his official capacity the petition accompanying this order, and cause the seal of the city to be affixed thereto, and the city solicitor be and is hereby authorized and directed to present the same to the general court now in session, at his earliest convenience, and to use his best efforts to obtain for the city an early and favorable consideration of the same by the legislature."

That even after the passage of said act of 1880, it was, under sections 10 and 12 of said act of 1880 and said acts of 1878 and 1879, within the power of said city of Newburyport to establish a water system of its own; and, by voting so to do, and by carrying out the other provisions of section 12 of said act of 1880, to render
3 inoperative said act of 1880, creating and establishing said Newburyport Water Company.

On information and belief that said city of Newburyport did not accept said act of 1879, or otherwise comply with the provisions of said act of 1880 enabling it to establish a water system of its own; and that said acts of 1878 and 1879 became void, as provided in section 12 of said act of 1880.

4. That the said act of 1880 was obtained by the incorporators of said Newburyport Water Company, the plaintiff, with the co-operation, assent and assistance of said City of Newburyport, defendant; that the said act was thereupon duly accepted by the incorporators named therein, and that thereupon a water supply system was duly established and operated as provided in said act; that under date of Aug. 17, 1880, a contract was made, in accordance with the provisions of section 8 of said act of 1880 (chapter 235) between said Newburyport Water Company and said City of Newburyport, a copy whereof, marked "Exhibit D," is hereto annexed and made part hereof; that by the terms of said contract, the right vested in said company to furnish water to said city, as therein provided, for the term of twenty years from such time as said company should have

so far completed its works as to be able to comply with the terms of said contract, and should notify said city that it was ready to furnish water according to said contract, and that said date should be not later than Jan. 1, 1882; that said date was, according to the provisions of said contract, afterwards fixed as Oct. 1, 1881; that by said act of 1880 and said contract the right vested in said company to furnish water to said city according to the terms, and for the compensation, agreed in said contract for twenty years from on or about Oct. 1, 1881, unless said city should purchase the property of said water company in accordance with section 11 of said chapter 235 of the Acts of 1880; that by said section it was provided that said city should have the right, at any time after ten years from such completion of said company's works, to purchase its entire property upon such terms as might be mutually agreed; and, in case of disagreement, the "*compensation*" for the entire property should be determined by commissioners; but such authority to purchase was
4 conditioned upon a vote in favor thereof by two thirds of the voters of said city present and voting; that no purchase or vote was ever made or taken or held under said section.

5. On information and belief, that on or about Aug. 30, 1880, the following question,

"Shall the City of Newburyport contract with the Newburyport Water Company for a supply of water for fire purposes for a term of twenty years, for the sum of six thousand dollars per annum, in accordance with terms of contract dated Aug. 17, 1880?"

was duly submitted to a vote of the voters of said city; that seven hundred and twenty-nine (729) of said voters voted "Yes," and that two hundred and twenty-six (226) of said voters voted "No;" that thereafter said contract was and remained in force until the delivery of the deed from said company to said city, dated Jan. 29, 1895, as hereinafter alleged.

6. Your orator avers that, under and by said acts of 1878, 1879 and 1880, and the said acts of the defendant relating thereto, and under and by said contract and said vote relating thereto, the exclusive right, at least as against said city, vested in said company to supply water to said city and its inhabitants, and also the exclusive right, at least as against said city, of eminent domain within the limits prescribed by said act of 1880; subject only to said city's right to purchase after ten years, and the reserved right set forth in Massachusetts Public Statutes, chap. 105, sect. 3, quoted below; and that by said acts of defendant, said defendant contracted with plaintiff not to compete with plaintiff in furnishing water to said city and its inhabitants, and not to apply to said general court for any legislation authorizing such competition, especially during said term of twenty years from on or about Oct. 1, 1881, and became estopped to deny that plaintiff had such exclusive rights of supply and eminent domain.

Said provision in section 3 of Public Statutes, chapter 105, is as follows:

"SECT. 3. Every act of incorporation passed after the eleventh day of March in the year eighteen hundred and thirty-one shall be subject to amendment, alteration, or repeal at the pleasure of the general court; but the corporation, notwithstanding such repeal, shall be subject to the provisions of sections forty-one and forty-two;"

Said section 41 is as follows:

"SECT. 41. Every corporation whose charter expires by its own limitation, or is annulled by forfeiture or otherwise, or whose corporate existence for other purposes is terminated in any other manner, shall nevertheless be continued as a body corporate for the term of three years after the time when it would have been so dissolved, for the purpose of prosecuting and defending suits by or against it, and of enabling it gradually to settle and close its concerns, to dispose of and convey its property, and to divide its capital stock, but not for the purpose of continuing the business for which it was established."

Said section 42 provides for a receiver where necessary.

7. On information and belief, that the defendant, on or about Nov. 30, 1892, presented a petition to said general court, praying, in effect, said general court for an act to authorize said city to compete with said company in furnishing water to said city and its inhabitants, without buying the plant of said company as provided in said act of 1880, and said contract dated Aug. 17, 1880, or otherwise; that said petition was in contravention of said company's vested rights under said act and contract, and also in contravention of the policy theretofore and thereafter existing in said Commonwealth, to wit, not to authorize any city or town to compete, in furnishing water, gas or electric light therein, with any private corporation engaged, with the consent of such city or town, in furnishing the same therein; and that said city endeavored to obtain the enactment of a bill framed in conformity with said petition and to authorize said city as aforesaid; that the following is a copy of said petition:

"To the honorable senate and house of representatives of the Commonwealth of Massachusetts, in general court assembled:

The undersigned petitioner, Orrin J. Gurney, mayor of the city of Newburyport, pursuant to an order of the city council of said city instructing him so to do, respectfully petitions for an act authorizing the city of Newburyport to supply itself and its inhabitants with water for fire, domestic, manufacturing, and other uses, and to construct a system of water works, with the right to take water, lands and water rights, and to incur a water debt therefor.

ORRIN J. GURNEY, *Mayor.*

Newburyport, Nov. 30, 1892."

8 That said petition was referred to the committee on water supply; that hearings were held by said committee; that said

company opposed said petition and opposed the passage of any act authorizing said city to compete with said company in furnishing water as aforesaid; that the opposition of said company was not wholly successful; that as a result of said petition and said opposition said general court enacted chapter 471 of the Acts and Resolves passed by the general court of Massachusetts in the year 1893; that as a result of said opposition by said company the provisions of sections 12 and 13 of said act were added to the provisions petitioned for as aforesaid by said city; and that said sections provided for the possibility of a sale by said company of its plant to said city.

A copy of said act of 1893 (chapter 471) is hereto annexed, marked "Exhibit E."

8. On information and belief, that on the twenty-fifth day of August, 1893, the citizens of said city of Newburyport who were qualified to vote on municipal affairs were called upon to give in their ballots, "Yes" or "No," in answer to the question, "Shall the city purchase the corporate property and all the rights and privileges of the Newburyport Water Company, upon the terms and conditions contained in section 12 of chapter 471 of the Acts of 1893?" That the result of such vote was as follows:

The whole number of votes cast was	1,636
"Yes" had three hundred and sixty-two	362
"No" had one thousand two hundred and sixty-six	1,266
Blanks had eight	8

That on the seventh day of September, 1893, the citizens of said city of Newburyport who were qualified to vote on municipal affairs were called upon to give in their ballots, "Yes" and "No," in answer to the question, "Shall the city of Newburyport accept chapter 471 of the Acts of 1893, authorizing the city of Newburyport to establish and maintain a system of water supply for domestic and other uses?" That the result of such voting was as follows:

Whole number of votes cast was	1,583
"Yes" had one thousand four hundred and sixty-three	1,463
"No" had one hundred and fifteen	115
Blanks had five	5

7 That thereupon and thereafter it was claimed by the defendant that said chapter 471 of the Acts of 1893 was duly accepted and became effective, and that the defendant had the right thereunder to supply said city and its inhabitants with water and to receive revenue therefor; that in this condition of affairs said city of Newburyport threatened thereupon to establish a system of water supply for said city of Newburyport and the inhabitants thereof, and to compete with and ruin plaintiff, The Newburyport Water Company, and that thereupon, plaintiff, The Newburyport Water Company,—fearing that said act of 1893 might be held to have been legally accepted, and fearing that the property of said company

would be damaged, ruined and destroyed by such threatened action of said city under said act of 1893,—presented to said general court on or about the — day of ——, 1893, a petition praying for the passage of an act providing and requiring that said city should, before proceeding to supply water to itself or its inhabitants under said act of 1893, purchase the entire property of said company, or that, in some other suitable way, said company might be compensated for the damage resulting from the threatened competition by said city; that a copy of said petition, marked, "Exhibit F," is hereto annexed and made part hereof; that with said petition said company presented a form of bill entitled "An act to provide for the purchase of property of the Newburyport Water Company by the city of Newburyport," a copy whereof, marked "Exhibit G," is hereto annexed and made part hereof; that said petition was referred to the committee on water supply; that said committee held hearings upon said petition, and that at such hearings both plaintiff and defendant herein were represented; that, during the pendency of said petition, said city—by its mayor counsel and otherwise—threatened to compete with said water company in supplying water to said city and its inhabitants, and to ruin said company by such competition; that such competition would have greatly damaged said water company and would have ruined said company; that, as the result of the opposition and contentions made by said city to said general court or legislature of 1894, said company was unable to obtain the enactment of said bill or act, a copy whereof appears annexed hereto as said Exhibit G; that without the assent, and against the con-
8 tentions, of said water company before and to said general court or legislature, an act in lieu of said proposed act was passed by said general court or legislature, and constitutes chapter 474 of the Acts and Resolves passed by the general court of Massachusetts for the year 1894, a copy of which, marked "Exhibit H," is hereto annexed and made part hereof.

9. That by the terms of said act of 1894 (chapter 474) said city was authorized to compete with said company in supplying water to said city and the inhabitants thereof unless said water company should notify in writing the mayor of said city within thirty days after the passage of said act that it, the said water company, "desires to sell to said city all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water," and unless said company should, within twenty days after the vote provided for in section 1 of said act of 1894, "deliver to said city proper deeds and instruments in writing, conveying to said city the property aforesaid."

That said act also provided (section 1) that "said company is authorized to make sale of said property to said city, and said city is authorized to purchase the same;" that said act was approved June 14, 1894; that on July 10, 1894, a special meeting of stockholders

of the said water company was held pursuant to a call and notice, a copy whereof is as follows:

"*Special Notice to the Stockholders of the Newburyport Water Co.*

NEWBURYPORT, *July* 3, 1894.

Notice is hereby given that a special meeting of the stockholders of the Newburyport Water Company will be held at Fraternity hall, Pleasant street, in the city of Newburyport, Massachusetts, on Tuesday, the 10th day of July, 1894, at 10 o'clock in the forenoon, to decide whether the company will offer to sell to the city of Newburyport all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants
9 thereof with water, as provided in section one of chapter four hundred seventy-four of the acts of the legislature of Massachusetts for the year eighteen hundred and ninety-four, and will authorize some suitable person or persons to notify the mayor of said city thereof in writing as provided in said section.

Per order of the board of directors of the Newburyport Water Company.

W. HERBERT NOYES, *President.*

JOHN E. McCUSKER, *Clerk.*"

That the number of shares of stock in said company was and is three thousand; that seventeen hundred and fifty-three shares were represented at said meeting by the stockholders present in person or by proxy; that some of the absent stockholders received no notice of such meeting; that the following vote was passed at said meeting:

"*Voted.* That this company desires to sell to the city of Newburyport, Massachusetts, all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water; and John E. McCusker, the clerk of the company, is hereby authorized and directed to notify the mayor of said city within thirty days from the fourteenth day of June, 1894, in writing, that the company so desires agreeably to the provisions of chapter 474 of the Acts of the legislature of Massachusetts for the year 1894, and the president and treasurer of said company are hereby authorized and directed, in case said city shall vote to purchase said property as provided by said act to execute and deliver to said city, within twenty days after said vote of said city, proper deeds and instruments in writing, conveying to said city the property aforesaid."

That pursuant to the provisions of said act of 1894 (chap. 474

sect. 1) notice was thereupon, on or about July 10, 1894, sent by said Newburyport Water Company, a copy of which notice, marked "Exhibit I," is hereto annexed and made part hereof.

That on or about Jan. 15, 1895, the following question,

"Shall the City of Newburyport purchase all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by the Newburyport Water Company, and used in supplying said city and the inhabitants thereof with water?"

was duly submitted to the vote of the legal voters of said city, in accordance with the provisions of section 1 of said chapter 474 of the Acts of 1894, and resulted as follows:

"Yes" had twelve hundred thirty-one	1,281
"No" had one hundred thirty-one	131
Blanks had six	6

That on or about Jan. 29, 1895, said Newburyport Water Company duly executed and delivered to said city a proper deed and instrument in writing, conveying to said city the property described in section 1 of said chapter 474 of the Acts of 1894; that said deed specifically conveyed (in the fifteenth paragraph thereof) said contract between said company and said city, dated Aug. 17, 1880; that said deed described the corporeal property conveyed in great detail, as will appear by reference thereto; that, in addition to said detailed description said deed contained (in paragraph 26 thereof) the following description of corporeal and incorporeal property conveyed:

"26. All the rights, privileges and easements heretofore acquired under chapter 235 of the Acts of the legislature of Massachusetts for the year 1880, and now used by said company, of laying and maintaining water pipes and mains in said streets, and of making connections therewith for the purpose of supplying said city and the inhabitants thereof with water, and all property, property rights, corporate property, privileges, easements, waters and water rights of said company, whether herein particularly described or not, and all the rights and franchises of said company, whether for supplying water to the city of Newburyport and the inhabitants thereof, and of collecting water rates therefor or otherwise.

Hereby conveying to said city all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water."

That a copy of said deed and instrument in writing, marked "Exhibit J," is hereto annexed and made part hereof; that said deed was duly accepted by said city; and that a vote was passed by the board of alderman of said city on Jan. 31, 1895, a copy of the record of which vote, marked "Exhibit K," is hereto annexed and made

part hereof; and that thereupon said city took possession of
11 all the property described in said deed, and still retains possession thereof and collects revenue therefrom.

10. Your orator further avers that the action of said water company detailed in the next preceding paragraph hereof, and resulting in said conveyance dated Jan. 29, 1895, was voluntary in name and form only, and was in fact compulsory; and that said offer of sale and deed were made by said company to said city of Newburyport "under the threat of municipal competition" by said city, and to avoid the ruin which would have resulted from such competition by said city; and that the said acts by which said city came into and obtained possession of the property described in said deed constituted a taking of such property in violation of the rights secured to plaintiff by the Constitution of the United States.

11. That the plaintiff, The Newburyport Water Company, and defendant, The City of Newburyport, were unable to agree upon the price to be paid for the said property purchased by said city and conveyed to it as aforesaid, and that the said Newburyport Water Company thereupon, on or about the seventh day of February, 1895, petitioned the supreme judicial court for the county of Essex in said Commonwealth to appoint three commissioners according to the provisions of said chapter 474 of the Acts of said year 1894, to determine such price; that commissioners were duly appointed by said court; that hearings were by them held from time to time, and that on or about Feb. 3, 1897, said commissioners made a report to said supreme judicial court, showing, amongst other things, exactly that portion of the property described in said deed which was included in the sum of $275,000, awarded by said commissioners to said company under its petition to said supreme judicial court, and showing that all other property and elements of value were excluded from said award; that from said report it appears that property described in said deed and required by the terms of said act of 1894 to be included therein, and found by said commissioners to be of value (and which is hereinafter alleged to be of the value of more than $475,000), was not allowed for at all in making said award, and that under said award said company would receive no compensation therefor;
12 that said commissioners reported the following as to what was included in and excluded from said award, and the claims made regarding the same:

"Sect. 1, chap. 474, in terms directs us to put a fair value upon the property for the purposes of its use by the city, and further provides that this value shall not be enhanced on account of the future earning capacity or good will, or the franchise of the company. To determine the fair value of the property for the purpose of its use by the city, as to any part that had any value in use to the city, we have valued the same at its value for that use at the time of the transfer. We have, as we think the statute so directs us, excluded from consideration the future earning capacity and good will of the plant, *and have not valued any franchise right whatever which the company owned or held at the time of the transfer, except its rights to take water*

as required and exercised by the taking under sect. 2, chap. 235, Acts of 1880. Neither have we, for the same reason, taken into consideration the earning capacity, whether past, present or future, or any income which the company had or might have derived from its plant.

Subject, then, to these rules we have valued the property *in its entirety* as a plant in full operation, engaged in supplying its water for domestic and municipal purposes, and in so doing we have taken into consideration the following elements of valuation, *and excluded all others:*

1. Cost of reproduction of all that part of the physical plant used in pumping and delivering water, less any depreciation. This method was employed without objection by all the experts who testified.

We have further valued the following:

2. All lands and buildings and easements in and to lands used for piping, and other appliances of the water company, not included within the real estate connected with the pumping station.

3. The personal property.

4. All books and plans conveyed to the city.

5. Water collected in the reservoir and wells upon the date of the transfer.

6. The water right of the company, taking into account not only the land, reservoir, dams and everything else that created the water right, but also the quantity and quality of water that gathers at this point, and its adaptability to the purposes for which it was in use when sold.

We have valued this right at what we have deemed it was worth for the purposes of its use by the city, taking into account its capacity, adaptability, usefulness, and connection with and relation to the plant, and having regard to the fact that we are valuing not what income its water had yielded or might yield in conjunction with the rest of the property, but the value of the right to have
13 water gather at this place to be used for such purposes. It appeared upon the evidence presented that there was only one other practical source of supply that could be availed of to supply the city and its inhabitants with the same quantity of water that had been supplied by the company, and some question was made as to the quality coming from this source. We heard evidence offered as to the probable cost of creating and maintaining a water right at this source to take the place of the water right used by the company, and, with the other elements above referred to, have taken this evidence into consideration in passing upon the value of the water right conveyed to the city.

7. We further find that the plant was a going concern and in full operation at the time of the transfer,—one that had been tested by experience and with which the city could begin the immediate prosecution of the business of supplying water to the established connections for domestic and municipal purposes (including in the latter hydrant service); and upon an examination of these facts, are

of opinion that the property had a greater value, for the purposes of its use by the city, by reason thereof, than as if the plant had not been in full operation, and that this should be considered in passing upon the value of the entire plant. This enhancement we have fixed upon as adding to the value of the property the sum of $40,000. In passing upon the same, *we have not made the income derived from the business its element or basis, or any other factor than that above stated.*

Upon consideration, therefore, of all the foregoing elements of value, *and excluding every other*, we find that the fair value of the property of the company for the purposes of its use by the city, upon Jan. 29, 1895, was two hundred and seventy-five thousand dollars ($275,000), with interest from that date." (Report of Commissioners, pages 3–5.)

Said report also contained the following:

"At the argument the petitioner contended and asked us to adopt the following propositions:

1. That the statute of 1893, chap. 471, never took effect, because the city had failed and refused to pass the vote to purchase the property of the Newburyport Water Company, as provided in sect. 12 of that act. (It was admitted that under that act the city duly passed a vote, Aug. 25, 1893, refusing to purchase the corporate property of the Newburyport Water Company, and that Sept. 7, 1893, it duly passed a vote to accept said act of 1893. It was claimed by the defendant that the City of Newburyport, by virtue of and upon such vote of acceptance, was thereupon authorized to establish and maintain a system of water supply under and according to said act of 1893.)

2. That the City of Newburyport acquired from the Newburyport Water Company all the incorporeal, as well as the corporeal, property of said company, including therein all the rights, franchises, easements, and privileges of every description, belonging to said company.

3. That by statutes of 1894, chap. 474, the water company was authorized to sell, and the city was bound to buy: (1) All the rights; (2) all the privileges; (3) all the easements; (4) all the lands; (5) all the water; (6) all the water rights; and (7) all the structures, pipes, machinery and other personal property used in supplying the city and its inhabitants with water. That such construction should be given to the statute as that every one of these words should have its full force and meaning; that none of them should be treated as vague and meaningless words; but assuming that they were put into the act as meaning something, that, if possible, such construction should be given to the statute as should give force and meaning to every one of these words in connection with the other words of the statute.

4. That the term 'rights and privileges' in sect. 1, chap. 474, Acts of 1894, included the right of the company to distribute water and collect water rates; that it did not mean or include the franchise of the company to be a corporation; and that the term 'franchise,' as

used in the last sentence of section 1, should be construed as meaning only the franchise to be a corporation, or the charter of the corporation.

5. That the last sentence of said section 1 did not preclude the commissioners from considering either the past or future earning capacity of the water company in determining the value of the property for the purposes of its use by the city of Newburyport, and that the past earning capacity of the company should properly be considered by the commissioners in determining the value of the corporate property for its use by the city; that the term 'good-will,' used in the same sentence of section 1, meant such peculiar and additional value as might pertain to the property by reason of the fact that the city succeeded to the business as conducted by the water company.

6. That the term 'the fair value of said property for the purposes of its use by the said city' entitled and required the commissioners to determine what could fairly be realized by said city from said property, and to award an amount which should represent the fair value of the property, including therein all the incorporeal rights, privileges and franchises belonging to said company.

We may assume that in so far as the propositions contained in the first three clauses are concerned, they are correct, and the definition of 'good will' set forth in the fifth clause we accept. Our estimation of the value of the property, however, is based upon the theory that, *whether or not the company vested everything in the city*, described in clause 2, we still remain of the opinion that the elements of valuation which we have already therein stated are all that we can take into consideration in making our award, and we have therefore confined ourselves strictly to these elements of valuation, and do not include anything else. Upon the petitioner's request, we further add that, at the time of the transfer, the company, acting under chapter 235, Acts of 1880, had, since 1881, laid down in the streets of the city of Newburyport many miles of its piping, its hydrants, and other appliances used in connection with the water plant.

In estimating the value of the property transferred we allowed for the cost of reproducing this piping, these hydrants, and other appliances, as appears in clause 1 of our elements of valuation; but we have not, in that element or in any other of the elements of valuation, taken into consideration or valued the exercise of this right, or the right itself, to so use the streets up to the time of the transfer; and whether or not we should so value we leave to the determination of the court, further stating that upon the evidence presented to us, the exercise of this right and the right itself was valuable." (Report of Commissioners, pages 13–15.)

12. On information and belief, that said report and award came on to be heard before a single justice of said supreme judicial court, and that said justice, on or about Feb. 10, 1897, reserved for the determination of the full court the question whether the award should be recommitted, and whether it should be accepted; that

thereafter said report and award of said commissioners were argued before, and considered by, the full court; that in such argument those who represented said company did not present or argue any claims or rights, under the Constitution of the United States, of said Newburyport Water Company, or of its stockholders generally, or of such of its stockholders as did not assent to the alleged sale and conveyance, or to the alleged offer in pursuance of which said sale and conveyance purport to have been made, and were not notified of the said special meeting of stockholders, and were not present, in person or by proxy, at said meeting, and have never assented to said alleged offer, sale or conveyance, or to any delivery thereunder of property of said Newburyport Water Company to the City of Newburyport; that thereafter, to wit, on or about June 14, 1897, said full court, by Holmes, J., rendered a decision and opinion confirming and accepting said award of the commissioners, and holding in effect that, even if the offer, sale and deed by said water company included, under the terms of said act of 1894, the corporeal and incorporeal property of said water company, including all its franchises (excepting, possibly, its right to be a corporation),
16 yet, under said act, said city was not bound to pay anything for the rights, and the exercise of rights, belonging to said company, which said commissioners had found and reported to be valuable, but not included in said award of $275,000.

A copy of said opinion, marked "Exhibit L," is hereto annexed and made part hereof.

That thereafter, on or about the — day of ——, 1897, said Newburyport Water Company filed in the supreme judicial court for the Commonwealth, in the county of Essex, a petition for re-hearing upon the points including, in substance, the following:

The said offer by the water company to sell was made under the threat of municipal competition by said City of Newburyport, and to avoid ruin, and was voluntary only in name; that said water company was not seeking to sell, and would not have sought to sell, had not said City of Newburyport declared its purpose to destroy the value of the corporate property of said water company, and that said company was compelled to act under said statute of 1894 to save what it could under that statute.

That said act of 1894, as construed in its decision and opinion, is repugnant to article 5 of the amendments to the Constitution of the United States, and deprives said water company of vested rights of property without just or reasonable compensation; that said water company relied, before said commissioners, and before said supreme judicial court, upon a construction of the statute of 1894 of said act of 1894, chapter 474, which made it unnecessary to raise these questions; that said water company supposed there was no question, but that the action of the petitioner in selling to the City of Newburyport would be regarded and taken as in effect compulsory, and that its right to compensation would be amply secured by a construction of said act of 1894, which assumed that the city had

in effect taken the property by the exercise of the right of eminent domain.

That said petition is still pending, and that it is doubtful whether or not the plaintiff herein was not and is not precluded from contesting in said cause pending in said supreme judicial court the constitutionality of said act of 1894, by reason of the fact that said proceedings were instituted by the petitioner under said act; that the time within which plaintiff had a right to avail itself of said statute was limited to thirty days, as above alleged; that as the constitutionality of said act might be eventually established, the
17 only safe course for said company to pursue was to file a petition under said act of 1894, as was done; that under the construction of the act contended for by the plaintiff herein before said commissioners and in said supreme judicial court, it would not have been open to plaintiff to claim that any of its property was taken without just compensation; that the provisions of said act of 1894 relating to value were novel; and that such construction as was placed thereon by said decision and opinion was wholly new, and was unexpected; and plaintiff claims that the said act of 1894, and said act of 1893 as re-enacted by said act of 1894, were in violation of the rights of plaintiff, The Newburyport Water Company, under the Constitution of the United States, as is hereinafter more specifically claimed; and that the exigency for questioning the constitutionality of said acts did not arise until after said decision and opinion were rendered as aforesaid.

13. Your orator further avers and shows and claims, that under said act of 1894, any so called purchase by said city from said company was a purchase, as an entirety, of "*all the rights, privileges*, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water;" that the corporeal and incorporeal parts of said property were and are inseparable; that the terms "*all* the rights, privileges * * * owned by said company," in said act of 1894 and in said deed, comprised *all* the franchises, or franchise rights, of said company, except possibly its right of corporate life; that the acceptance of said deed by said city was an acceptance and taking of *all* the property (including said rights and privileges and the contract between said company and said city) described in said deed; that said contract was a part of said "rights * * * owned by said company and used in supplying said city * * * with water;" and that by the terms of said act it was provided that "said city shall pay to said company the fair value *thereof*, to be ascertained as hereinafter provided."

14. Your orator further avers and claims

(*a.*) That the effect of said act of 1894, and said act of 1893 as re-enacted by said act of 1894, under the circumstances alleged,
18 and as construed by said supreme judicial court in said opinion, was to take by law the property of said company (to wit, that portion of the property described in said deed, a copy whereof

is annexed hereto, marked "Exhibit J," which was not included in the property valued by said commissioners in their award of $275,000) without the actual consent of said company and of its stockholders, and of each of them, and to give it to said City of Newburyport, and to enable said City of Newburyport thereby to take the same from plaintiff; that, whether such taking was direct or indirect, it was a taking of the private property of said company and of its stockholders for public use, and without just compensation—without any compensation whatever—for the property so taken, and was in violation of article 5* of the amendments to the Constitution of the United States, and of plaintiff's rights thereunder.

*(*b.*) That said legislation, as so construed, deprived and deprives plaintiff of its property without due process of law, in violation of said article 5 of amendments to the Constitution of the United States, and of plaintiff's rights thereunder.

*(*c.*) That said legislation, as so construed, impaired and impairs the obligation of contracts belonging to said company and to its stockholders, in violation of section 10 of article 1 of the Constitution of the United States, and the plaintiff's rights thereunder.

*(*d.*) That by said legislation, as construed as aforesaid, the State or Commonwealth of Massachusetts denied and denies to plaintiff and its stockholders the equal protection of the laws, in violation of article 14 of the amendments to the Constitution of the United States, and of plaintiff's rights thereunder.

(*e.*) That whether or not said act of 1894 was otherwise constitutional,—according to the construction placed thereon by said decision,—the intention of said general court or legislature in enacting the same was to give and transfer incorporeal property of the plaintiff to defendant, The City of Newburyport, without any payment therefor to plaintiff, although under the charter of said water company, to wit, said chapter 235 of the Acts of 1880, it was provided that said city should have the right to purchase the property of said water company after ten years, by making compensation for said company's entire property; that said act of 1894, and said act of 1893 as re-enacted by the said act of 1894, as construed as aforesaid, are both and severally unreasonable and unjust to such a degree as to violate the rights of plaintiff under the Constitution of the United States; and plaintiff claims that said unreasonableness and injustice are established by the facts hereinbefore alleged, and also by the following facts; to wit, that said act of 1894, as construed,* provided in effect that no payment was to be made to said company for its right to use the streets of said city for laying pipes therein and distributing water therefrom; that said rights were acquired from said act of 1880 (chapter 235), and from said contract between said company and said city dated Aug. 17, 1880; that, as shown above, the city had the right to purchase the company's entire property only after ten years from Oct. 1, 1881, at the end of which period the corporeal property would be worth

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* See amendment, page 73.

somewhat less than when used,* while said rights, if the company's risk proved successful, would have become valuable; that when the act of 1894 was passed the net income of the company from the use of its corporeal and incorporeal property, including said rights (after paying all taxes and expenses) was over thirty thousand dollars; that this sum is equal to an investment of $750,000, at four per centum; that said commissioners value the property of the company, exclusive of these rights (excluding also from valuation said contract between the city and the company which plaintiff claims was included within the "rights" intended to be sold to the city), at $275,000, and that said rights (including said contract) were actually worth more than the difference between said sums of $750,000 and and $275,000, to wit, more than the sum of $475,000.*

15. Your orator further avers and shows, on information and belief, that on or about July 12, 1897, said City of Newburyport, although informed of the pendency of said petition for rehearing, authorized the issuance of bonds to the amount of $375,000, under said chapter 474 of the Acts of the Year 1894, and said chapter 471 of the Acts of the Year 1893, and threatens and intends to negotiate the same, and, out of the proceeds thereof, to tender to said water company the amount of said award and interest.

16. Your orator further shows that this is a suit of a civil nature in equity; that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, and arises under the Constitution of the United States.

Wherefore your orator prays:

First. That it may be adjudged and decreed that chapter 474 of the Acts and Resolves passed by the general court of Massachusetts, as construed as aforesaid by the supreme judicial court of Massachusetts,† is unconstitutional and in violation of the rights secured to your orator by and under the Costitution of the United States.

Second. That chapter 471 of the Acts and Resolves passed by the general court of Massachusetts in the year 1893 as re-enacted by said chapter 474 of the Acts of 1894, and as construed in said decision by the supreme judicial court of Massachusetts, in† unconstitutional and in violation of the rights secured to your orator by and under the Constitution of the United States.

Third. That the defendant has taken and holds the property described in said deed, marked "Exhibit J," in violation of the rights secured to plaintiff by the Constitution of the United States.

Fourth. That it may be decreed and ordered that said deed be cancelled and be given up to plaintiff, and the property received thereunder by defendant be restored to plaintiff.

Or, in the alternative thereof,

Fifth. That it be decreed and ordered that defendant reconvey and restore to plaintiff all the corporeal and incorporeal property described in said deed marked "Exhibit J."

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* See amendment, pages 73, 74.
† See amendment, page 74.

Sixth. That the damages suffered by plaintiff for the wrongful taking, detention and use by defendant of the property described in said deed marked "Exhibit J," and for all waste or loss suffered by plaintiff in respect to the same, may be ascertained and declared; and that it may be adjudged, decreed and ordered that defendant shall pay to plaintiff the amount thereof.

Or, in the alternative thereof,

21 *Seventh.* That in case this court should decide that the defendant may be permitted to retain the property described in said deed, upon paying to plaintiff just compensation for the entire property taken and received by defendant from plaintiff, the amount of such just compensation may be ascertained and declared, and that it may be adjudged, decreed and ordered that defendant pay to plaintiff the amount of such just compensation.

Eighth. That the defendant be restrained from making, executing, negotiating and issuing any bonds under the provisions of said act of 1894, relating to the issue of bonds; and also from attempting in any way to enforce said award; also that defendant be restrained from extending, changing, altering, parting with, or wasting in any way, the system and plant and property described in said deed; and from paying out for any purpose but the purpose of operating said system and plant any of the funds or revenue arising out of said system, plant and property.*

Ninth. That a receiver may be appointed to take charge of the property described in said deed, and comprising the plant which said deed purports to convey, and to operate the same under the direction of this court, until the determination, under this bill of complaint, of the rights and title of the respective parties hereto, to the property described in said deed.

Tenth. And that your orator may have such other, or further, or different relief in the premises as to a court of equity may seem meet.

To the end, therefore, that the said defendant may, if it can, show why your orator should not have the relief herein and hereby prayed, and may full, true, direct and perfect answer make, to the best and utmost of its knowledge, remembrance, information and belief, to each and all of the matters and things in this bill of complaint contained, and that as fully and particularly as if the same were here repeated, paragraph by paragraph, and they were specially interrogated thereunto, may it please your honors to grant unto your orator a *subpœna ad respondendum* issuing out of and under the seal of this honorable court, to be directed to the said defendant,

22 The City of Newburyport, commanding it on a certain day, and under a certain penalty to be therein inserted, to appear before your honors in this honorable court, and then and there full, true, direct and perfect answer make to all and singular the premises; and, further, perform and abide by such further order and decree as to your honors shall seem meet; and also a writ of provisional and

*See amendment, page 74.

a writ of perpetual injunction to the same purport, tenor, and effect, as is hereinbefore set forth and prayed.

And your orator, as in duty bound, will ever pray, etc.

NEWBURYPORT WATER COMPANY,
By W. HERBERT NOYES, *President.*

LAURISTON L. SCAIFE,
Solicitor for Complainant.
ROBERT M. MORSE,
LAURISTON L. SCAIFE,
Of Counsel.

UNITED STATES OF AMERICA,
District of Massachusetts, Suffolk County.

W. Herbert Noyes, being duly sworn, says: That he is president of The Newburyport Water Company, the complainant in the foregoing bill of complaint, and knows the contents thereof; that the allegations therein contained, as far as they relate to his own acts, are true, and as far as they relate to the acts of others, he believes them to be true.

That in regard to all matters and things in the foregoing bill of complaint alleged, which are not within the personal knowledge of this deponent, the deponent has been fully informed, and he believes that the same are true.

W. HERBERT NOYES.

Sworn to before me this nineteenth day of July, 1897.
[SEAL] HENRY S. MacPHERSON,
Notary Public.

23 EXHIBIT A.

Acts and Resolves Passed by the General Court of Massachusetts in the Year 1880.

Page 184, chapter 235.

An act to incorporate the Newburyport Water Company.

Be it enacted, etc., as follows:

SECTION 1. Joseph B. Morss, William H. Huse, Edward F. Coffin, Edward P. Russell, Henry M. Cross and Lawrence B. Cushing, their associates and successors, are hereby made a corporation by the name of the Newburyport Water Company, for the purpose of furnishing the inhabitants of Newburyport with pure water for the extinguishment of fires, and for domestic and other purposes; with all the powers and privileges, and subject to all the duties, restrictions and liabilities set forth in all general laws which now are or hereafter may be in force, applicable to such corporations.

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SECT. 2. Said corporation, for the purposes aforesaid, may take and hold the water, or so much thereof as may be necessary, not exceeding one and a half million of gallons daily, of any springs, natural ponds or brooks within the limits of said city, or of Kimball's pond, in the towns of Amesbury and Merrimac, or any of the effluents from said pond, or from the Powow river, in said town of Amesbury and the town of Salisbury; and may convey said waters, or any part thereof, into and through said city and said towns of Amesbury and Salisbury; and may take and hold, by purchase or otherwise, any real estate necessary for the raising, preservation and purity of the same, or of forming dams or reservoirs to hold the same, and for laying and maintaining aqueducts and pipes for distributing the waters so taken and held in any and all parts of said city and towns of Amesbury and Salisbury; and may lay its water pipes through any private lands, with the right to enter upon the same and dig therein for the purpose of making all necessary repairs or service connections; and for the purposes aforesaid may carry its pipes under or over any water course, street, railroad, highway or other way, in such manner as not to obstruct the same; and may enter upon and dig any road or other way for the purpose of laying or repairing its aqueducts, pipes or other works; and in general may do other
24 acts and things convenient or proper for carrying out the purposes of this act. In case either of the towns in which said Kimball's pond is situated should hereafter apply for authority to take water from the same, the powers hereby granted shall not be construed as creating any priority of right, or operate in the prejudice of such application.

SECT. 3. Said corporation may declare the quantity of water proposed to be taken under this act, not exceeding one and a half million of gallons daily, not less than three months before the waters shall be withdrawn from said springs, ponds or brooks; and within sixty days from the time it shall take any lands, springs, ponds or brooks for the purpose of this act, otherwise than by purchase, said corporation shall file in the registry of deeds for the southern district of the county of Essex a description of such lands, springs, ponds, brooks or water, sufficiently accurate for identification, and state the purposes for which it is so taken, and the title of any land so taken shall vest in said corporation; and upon such filing the terms shall be the measure and limit of the right of said corporation to take and divert the waters of such springs, ponds or brooks; but if no such notice is filed, said measure and limit shall be one and a half million of gallons daily. If at any time said corporation shall take a larger quantity of water than said limit it may be restrained by injunction from taking such larger quantity, in a suit in equity brought by any party interested.

SECT. 4. Any person or corporation injured in any way by any acts of said corporation under this act, and failing to agree with said corporation as to the amount of damages, may have the same assessed and determined in the manner provided when land is taken for highways; but no application shall be made to the county com-

missioners for the assessment of damages for the taking of water rights until the water is actually taken and diverted by said corporation. Any person whose water rights are thus taken or affected may apply as aforesaid within three years from the time the water is actually withdrawn or diverted, and not thereafterwards, and no suit for injury done under this act shall be brought after two years from the alleged date of the receipt of injury.

SECT. 5. If said corporation takes the water from Kimball's pond or any of its affluents, or from Powow river, it shall lay its aqueduct or main pipe for conducting the same to said city by some convenient route through the town of Amesbury. The inhabitants of any town upon the line of the works authorized by this act, upon the application of its board of selectmen, shall be entitled to the reasonable use of the water, for the same uses as are hereinbefore provided, upon paying an equitable compensation therefor, which in case of difference shall be determined by three commissioners, to be appointed by the supreme judicial court, upon application of either party and notice to the other, whose award when accepted by the court shall be binding upon the parties for the term of five years.

SECT. 6. Any town under whose roads, streets or ways said corporation lays its aqueducts or main pipe may require said corporation to insert therein proper hydrants, at points not less than five hundred feet apart, to be used for extinguishing fires, and for no other purpose. The expense of inserting said hydrants and keeping the same in repair shall be paid by such town.

SECT. 7. If any person shall use any water taken under this act without the consent of said corporation, or shall wantonly or maliciously divert the water, or any part thereof, taken or held by said corporation pursuant to the provisions of this act, or corrupt the same or render it impure, or destroy or injure any dam, aqueduct, conduit, pipe, hydrant, machinery or other works or property held, owned or used by said corporation, under the authority of and for the purposes of this act, he shall forfeit and pay to said corporation three times the amount of damage assessed therefor, to be recovered in an action of tort; and on conviction of either of the wanton or malicious acts aforesaid may be also punished by fine not exceeding three hundred dollars, or by imprisonment in jail not exceeding one year.

SECT. 8. Said corporation may distribute the water through said city of Newburyport; may establish and fix from time to time rates for the use of said water and collect the same; and may make such contracts with the said City of Newburyport or with individuals or corporations to supply water for fire or for other purposes as may be agreed upon by said city or individuals or corporations, and said corporation; *provided* that the source of supply, the size and quality of the pipes to be used, shall be approved by the board of water commissioners to be appointed under the provisions of this act. The City of Newburyport is hereby authorized to contract for a supply of water for fire purposes for a term of years with

said Newburyport Water Company; *provided*, the same is assented to by said city by a majority vote of the voters present and voting thereon at a legal meeting called for that purpose.

SECT. 9. Said corporation, for the purposes set forth in this act, may hold real and personal estate, and the whole capital stock shall not exceed three hundred thousand dollars, to be divided into shares of one hundred dollars each.

SECT. 10. The City of Newburyport is hereby authorized to appoint a board of water commissioners, to consist of five citizens of said city, who shall be chosen by the city council by joint ballot of both branches, whose duties it shall be to investigate all questions relative to the introduction of pure water into said city; to ascertain the cost of the same, and to report the result of the investigation and deliberations upon the same to the city council, at least ten days prior to the time appointed by section twelve of this act for said city, to vote upon the acceptance of chapter two hundred and forty of the acts of the year eighteen hundred and seventy-eight. They shall serve without compensation, but the necessary expenses and liabilities incurred in the employment of engineers and personal examination of various systems of water supply shall be defrayed by said city; and the city council shall appropriate such sum or sums of money as may be needed for this purpose, and in the same manner as money is appropriated for other city purposes.

SECT. 11. The City of Newburyport shall have the right at any time after ten years from the date of the completion of said works to purchase the corporate property and all the rights and privileges of said company at a price which may be mutually agreed upon between said corporation and the said City of Newburyport; and the said corporation is authorized to make sale of the same to said city. In case said corporation and city are unable to agree, then the compensation to be paid shall be determined by three commissioners to be appointed by the supreme judicial court upon application of either party, and notice to the other, whose award when accepted by the court
27 shall be binding upon both parties. And this authority to purchase said franchise and property is granted on condition that the same is assented to by said city by a two-thirds vote of the voters present and voting thereon at a meeting called for that purpose.

SECT. 12. In case the City of Newburyport shall accept chapter two hundred and forty of the acts of the year eighteen hundred and seventy-nine, within two months from the date of the passage of this act, and shall also within three months after so accepting the same vote to construct the works contemplated therein, and to raise and appropriate the necessary sum of money therefor, this act shall be inoperative; otherwise this act shall take effect at and upon the expiration of the said two months, and the said chapter two hundred and forty of the acts of the year eighteen hundred and seventy-eight, as revived by chapter two hundred and forty of the acts of the year eighteen hundred and seventy-nine, shall become void.

Approved April 23, 1880.

Exhibit B.

Acts and Resolves of Massachusetts, 1878.

Chapter 240.

An act to supply the City of Newburyport with water.

Be it enacted, etc., as follows:

Section 1. The City of Newburyport is hereby authorized to supply itself and its inhabitants with pure water to extinguish fires, generate steam, and for domestic and other uses, and may establish public fountains and hydrants, and regulate their use, and may discontinue the same, and may collect such rents as may be fixed for the use of such water.

Sect. 2. Said city for the purposes aforesaid may take and hold the water, or so much thereof as may be necessary, not exceeding one and a half million of gallons daily, of any springs, natural ponds or brooks within the limits of said city, or of Kimball's pond in the towns of Amesbury and Merrimac, or any of the effluents from said pond; and may convey said waters or any part thereof into and through said city and said town of Amesbury and
28 the town of Salisbury; and may also take and hold, by purchase or otherwise, all necessary lands for raising, holding, flowing, diverting, conducting and preserving such waters, and conveying the same to any and all parts of said city and of said towns of Amesbury and Salisbury; and may erect thereon proper dams, reservoirs, buildings, fixtures and other structures, and make excavations and embankments, and procure and run machinery therefor; and for such purposes may construct and lay down conduits, pipes and drains in, under or over any lands, water-courses, roads or railroads, and along any street, highway, or other way other than a railway, in such manner as not to unnecessarily obstruct the same; and for the purpose of constructing, laying down, maintaining and repairing such conduits, pipes and drains, and for all other purposes of this act, may dig up, raise and embank any such land, street, highway or other way, in such manner as to cause the least hindrance to travel thereon; and in general may do any other acts and things necessary or convenient and proper for carrying out the purposes of this act. In case either of the towns in which said Kimball's pond is situated should hereafter apply for authority to take water from the same, the powers hereby granted shall not be construed as creating any priority of right, or operate to the prejudice of such application.

Sect. 3. Said City of Newburyport may, by vote of its city council, declare the quantity of water proposed to be taken under this act, not exceeding one and a half million of gallons daily, such vote to be passed not less than six months before the waters shall be with-

drawn from said springs, ponds or brooks; and within sixty days from the time it shall take any lands, springs, ponds, brooks or water for the purposes of this act, otherwise than by purchase, said city shall file in the registry of deeds for the southern district of the county of Essex a description of such lands, springs, ponds, brooks or water, sufficiently accurate for identification, with a statement for the purposes for which the same are taken, together with a copy of such vote, if any has been passed, signed by the mayor of said city; and upon such filing, the terms of such vote shall be the measure and limit of the right of said city to take and divert the waters of such springs, ponds or brooks; but if no such vote is so passed
29 and filed said measure and limit shall be one and a half million of gallons daily. If at any time said city shall take a larger quantity of water than said limit, it may be restrained by injunction from taking such larger quantity, in a suit in equity brought by any party interested.

SECT. 4. Said City of Newburyport shall be liable to pay all damages that shall be sustained by any person or persons in their property by the taking of said waters or any part thereof as authorized by this act, or by the taking of any land, rights of way, water rights or easements, or by the erection of any dams, or the construction of any aqueducts, reservoirs, water ways or other works for the purposes of this act; and if the owner or owners of any property which shall be taken as aforesaid, or other person or persons sustaining damages as aforesaid, shall not agree on the damages to be paid therefor, he or they may apply by petition for an assessment of the damages at any time within three years from the taking of the said property, or the construction of dams or other works occasioning damages as aforesaid, and not afterwards, to the superior court in the county in which the same are situated. Such petition may be filed in the clerk's office of said court, in vacation or in term time, and the clerk shall thereupon issue a summons to the said City of Newburyport, returnable, if issued in vacation, at the next term of the said court to be held after the expiration of fourteen days from the filing of said petition, and if in term time, returnable on such day as said court shall order, to appear and answer to the said petition; the said summons shall be served fourteen days at least before the term or day at which it is returnable, by leaving a copy thereof and of the said petition, certified by the officer who shall serve the same, with the clerk of said city; and the said court may, upon default or hearing of said city, appoint three disinterested persons, who shall, after reasonable notice to the parties, assess the damages, if any, which such petitioner may have sustained as aforesaid; and the award of the said persons so appointed, or a major part of them, being returned into and accepted by the said court, shall be final, and judgment shall be rendered and execution issued thereon for the prevailing party, with costs, unless one of said parties shall claim a trial by jury as hereinafter provided.

SECT. 5. If either of the parties mentioned in section four
30 shall be dissatisfied with the amount of damage awarded as therein expressed, such party may, at the term at which such

award was accepted, or the next term thereafter, claim in writing a trial in said court, and have a jury to hear and determine at the bar of said court all questions of fact relating to such damages, and to assess the amount thereof; and the verdict of said jury being accepted and recorded by the said court, shall be final and conclusive, and judgment shall be rendered and execution issued thereon, and costs shall be recovered by the said parties respectively in the same manner as is provided by law in regard to proceedings relating to the laying out of highways.

SECT. 6. If said city takes the water from Kimball's pond or any of its effluents, it shall lay its aqueduct or main pipe, for conducting the same to said city, by some convenient route through the town of Amesbury. The inhabitants of any town upon the line of the works authorized by this act, upon the application of its board of selectmen, shall be entitled to the reasonable use of the water, for the same uses as are herein before provided, upon paying an equitable compensation therefor, which in case of difference shall be determined by three commissioners, to be appointed by the supreme judicial court upon application of either party, and notice to the other, whose award, when accepted by said court, shall be binding upon the parties for the term of five years.

SECT. 7. Any town under whose roads, streets or ways said city lays its aqueduct or main pipe may require said city to insert therein proper hydrants, at points not less than five hundred feet apart, to be used for the purpose of extinguishing fires, and for no other purpose. The expense of inserting said hydrants and keeping the same in repair shall be paid by such town.

SECT. 8. No application shall be made to the court for the assessment of damages for the taking of any water rights, or for any injury thereto, until the water is actually withdrawn or diverted by said city under the authority of this act.

SECT. 9. If any person shall use any water taken under this act without the consent of said city, or shall wantonly or maliciously divert the water, or any part thereof, taken or held by said city pursuant to the provisions of this act, or corrupt the same, or render it impure, or destroy or injure any dam, aqueduct, pipe, conduit,
31 hydrant, machinery or other works or property held, owned or used by said City of Newburyport under the authority of and for the purposes of this act, he shall forfeit and pay the said city three times the amount of damage assessed therefor, to be recovered in an action of tort; and on conviction of either of the wanton or malicious acts aforesaid, may be also punished by fine not exceeding three hundred dollars, or by imprisonment in jail not exceeding one year.

SECT. 10. For the purpose of paying all necessary expenses and liabilities incurred under the provisions of this act, said city shall have authority to issue coupon bonds to be denominated "Newburyport water bonds," to be signed by the treasurer of said city, to an amount not exceeding two hundred and fifty thousand dollars, payable at periods not exceeding thirty years from the date thereof,

with interest payable semi-annually at a rate not exceeding six per centum per annum; and said city may sell said bonds at public or private sale, or pledge the same for money borrowed for the purposes of this act, upon such terms and conditions as it may deem proper. And the city council of said city is hereby authorized from time to time to appropriate, grant and assess such sum or sums of money as shall be deemed expedient, towards paying said expenses, or the principal of the money so borrowed or obtained, and the interest thereof, in the same manner as money is appropriated, granted and assessed for other city purposes.

SECT. 11. The rights, powers and authority granted to the city of Newburyport by this act shall be vested in and exercised by a board of water commissioners, consisting of three citizens of said city, who shall be chosen by the city council, by joint ballot of both branches. The said commissioners shall, during their continuance in office, execute, superintend and direct the performance of all the works, matters and things mentioned in the preceding sections which are not otherwise specifically provided for in this act; and shall be subject to such ordinances, rules and regulations, in the execution of their said trust, as the city council may from time to time ordain and establish, not inconsistent with the provisions of law. They shall serve for the period of three years from the time of their appointment, unless the construction of the works herein contemplated shall be sooner finished. Thereafter the rights, powers and
32 authority granted to the said city by this act shall be vested in and exercised by a board of water commissioners, consisting of three citizens of said city, who shall be chosen by the city council, by joint ballot of both branches, one for the term of one year from the first Monday of January in the year eighteen hundred and eighty-one, one for the term of two years, one for the term of three years, and annually thereafter one water commissioner shall be chosen to serve for the term of three years. Said commissioner shall receive such compensation as the city council of said city may prescribe, and a majority of said commissioners shall be a quorum for the exercise of the powers and duties prescribed by this act.

SECT. 12. The said water commissioners shall establish such prices or rents for the use of the water as to provide annually, if practicable, from the net income and receipts therefor, for the payment of the interest on said water bonds, and also, after three years from the introduction of the water into said city, for the further payment of not less than one per centum of the principal of said bonds. The net surplus income and receipts, after deducting all expenses, interest and charges of distribution, shall be set apart as a sinking fund, and applied solely to the payment of the principal of said bonds, until the same are fully paid and discharged. The "commissioners of sinking fund," as now establishad by ordinance of said city, shall be trustees of said fund, and shall annually, and as often as the city council may require, render an account of all their doings in relation thereto.

SECT. 13. The occupant of any tenement shall be liable for the

payment of the rent for the use of the water in such tenement; and the owner thereof shall be also liable if, on being notified of such use, he does not object thereto.

SECT. 14. This act shall take effect upon its passage, and shall become void unless accepted by a vote of two thirds of the legal voters of the city of Newburyport, present and voting thereon, at a legal meeting which shall be called in their several ward rooms for that purpose, by the mayor and aldermen of said city, within one year from the passage of this act, at which meeting the check list shall be used.

Approved May 11, 1878.

33 EXHIBIT C.

Acts and Resolves of Massachusetts, 1879.

Chapter 240.

An act to revive "An act to supply the city of Newburyport with water."

Be it enacted, etc., as follows:

Chapter two hundred and forty of the Acts of the Year Eighteen hundred and seventy-eight, being "An act to supply the city of Newburyport with water," is hereby revived and continued for two years from the passage of this act.

Approved April 18, 1879.

EXHIBIT D.

This indenture, made and concluded this seventeenth day of August, A. D. 1880, by and between the Newburyport Water Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts, of the one part, and the City of Newburyport, a municipal corporation existing under the laws of said Commonwealth, of the other part:

Witnesseth, that whereas said water company, the party of the first part, proposes to construct works and lay pipes for the introduction of water into said city (the party of the second part) for fire and other purposes; and whereas the party of the second part is desirous that its citizens should have the best possible protection against fire.

Now, know all men by these presents, that said water company, the party of the first part, agrees with said city, the party of the second part, as follows, namely:

First. That it will furnish said city water as hereinafter provided, unless sooner terminated by the purchase of its property by said

party of the second part in accordance with section 11 of chapter 235 of the Acts of 1880.

Second. That it will lay and maintain a system of pipes in said Newburyport, substantially in accordance with the plan marked "A, 1880," deposited in the city hall in said Newburyport; that the source of supply and size and quality of the pipes to be used shall be approved by the board of water commissioners of said city, as provided in said act; that it will furnish and set one hundred and twenty-five double-nozzle fire hydrants at points indicated on said plan, and at any time or times, on request of the city council of Newburyport, will furnish and set additional hydrants at points indicated by said party of the second part, at the expense of said party of the first part, provided that the whole number of hydrants shall not exceed one hundred and fifty; that it will at all times maintain a head of water not less than one hundred and twenty-five feet above tide water, and will furnish and maintain a full supply of water for fire purposes during the existence of this contract.

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And in consideration of the above, the party of the second part agrees to pay therefor to the party of the first part the sum of six thousand dollars in each and every year during the existence of this contract, payable in half-yearly payments in January and July. And it is agreed that said term of twenty years shall begin at such time as said company shall have so far completed its works as to be able to comply with the terms of this contract and shall notify said city that it is ready to furnish said water, and that said date shall not be later than the first day of January, A. D. 1882.

And it is further agreed that said company will save the city harmless from all damage arising from the default of said company while constructing said works or in the operation of the same.

Provided, however, that this contract shall be of no force and effect until the same has been assented to by said city by a majority vote of the voters present and voting thereon at a legal meeting called for that purpose, as provided in section eight of the forementioned act.

In witness whereof, the said City of Newburyport, by John James Currier, its mayor, thereto duly authorized, and the Newburyport Water Company, by G. Norman Weaver, its treasurer, thereto duly authorized, have caused these presents to be subscribed in their names and behalf, and the said company has caused the same to be countersigned by Joseph B. Morss, its president, the day and year above written.

G. NORMAN WEAVER, *Treasurer.*
JOSEPH B. MORSS, *President.*
JOHN J. CURRIER,
Mayor of the City of Newburyport.

35 EXHIBIT E.

Acts and Resolves Passed by the General Court of Massachusetts in the Year 1893.

Chapter 471.

An act to supply the city of Newburyport with water.

Be it enacted, etc., as follows:

SECTION 1. The City of Newburyport may supply itself and its inhabitants with water for the extinguishment of fires and for domestic, manufacturing and other purposes, and may establish fountains and hydrants, relocate or discontinue the same; may regulate the use of such water and fix and collect rates to be paid for the use of the same.

SECT. 2. The said city, for the purposes aforesaid, may take, by purchase or otherwise, and hold the waters of any pond, stream, spring or wells within the limits of said city not heretofore taken or purchased by the Newburyport Water Company, and the Artichoke river in West Newbury and Newburyport, and the water rights connected therewith; and obtain and take water by means of bored, driven, artesian or other wells on any lands within said city, and hold and convey said water through said city and through said town of West Newbury from said ponds and said river; and may also take and hold, by purchase or otherwise, all lands, rights of way and easements necessary for holding and preserving such water and for conveying the same to any part of said city of Newburyport; and may erect on the land thus taken or held proper dams, buildings, fixtures and other structures; and may make excavations, procure and operate machinery and provide such other means and appliances as may be necessary for the establishment and maintenance of complete and effective water works; and may construct and lay down conduits, pipes and other works: under or over any lands, water courses, railroads or public or private ways, and along any such way in such manner as not unnecessarily to obstruct the same; and for the purpose of constructing, maintaining and repairing such conduits, pipes and other works, and for all proper purposes of this act, said city may dig up any such lands, and, under the direction of the board of selectmen of the town in which any such ways are
36 situated, may enter upon and dig up any such ways in such manner as to cause the least hindrance to public travel thereon.

SECT. 3. The city shall, within sixty days after the taking of any lands, rights of way, water rights, water sources or easements as aforesaid, otherwise than by purchase, file and cause to be recorded in the registry of deeds, for the county within which the same are situated, a description thereof sufficiently accurate for identification,

with a statement of the purpose for which the same were taken, signed by the water commissioners hereinafter provided for.

SECT. 4. The city shall pay all damages sustained by any person or corporation in property by the taking of any land, right of way, water, water source, water right or easement, or by any other thing done by said city under the authority of this act. Any person or corporation sustaining damages as aforesaid under this act, who fails to agree with said city as to the amount of damages sustained, may have the damages assessed and determined in the manner provided by law when land is taken for the laying out of highways, on application at any time within the period of three years from the taking of such land or other property, or in the doing of other injury, under the authority of this act, but no such application shall be made after the expiration of said three years. No application for assessment of damages shall be made for the taking of any water, water right, or for any injury thereto, until the water is actually withdrawn or diverted by said city under authority of this act.

SECT. 5. The said city may, for the purpose of paying the necessary expenses and liabilities incurred under the provisions of this act, issue from time to time bonds, notes or scrip, to an amount not exceeding in the aggregate four hundred thousand dollars; such bonds, notes or scrip shall bear on their face the words, "Newburyport water loan;" shall be payable at the expiration of periods not exceeding thirty years from the date of issue; shall bear interest payable semi-annually at a rate not exceeding six per centum per annum, and shall be signed by the treasurer of the city and be countersigned by the water commissioners hereinafter provided for. The said city may sell such securities at public or private sale, or pledge the same for money borrowed for the purposes of this act, upon such terms and conditions as it may deem proper, *pro-*
37 *vided*, that such securities shall not be sold for less than par value thereof. The city shall provide, at the time of contracting said loan, for the establishment of a sinking fund, and shall annually contribute to such fund a sum sufficient with the accumulations thereof to pay the principal of said loan at maturity. The said sinking fund shall remain inviolate and pledged to the payment of said loan and shall be used for no other purpose.

SECT. 6. The said city instead of establishing a sinking fund may, at the time of authorizing said loan, provide for the payment thereof in such annual proportionate payments as will extinguish the same within the time prescribed in this act; and when such vote has been passed the amount required thereby shall, without further vote, be assessed by the assessors of said city in each year thereafter, until the debt incurred by said loan shall be extinguished in the same manner as other taxes are assessed, under the provisions of section thirty-four of chapter eleven of the public statutes.

SECT. 7. The return required by section ninety-one of chapter eleven of the public statutes shall state the amount of any sinking fund established under this act, and if none is established, whether action has been taken in accordance with the provisions of the pre-

ceding section, and the amounts raised and applied thereunder for the current year.

SECT. 8. The said city shall raise annually by taxation a sum which, with the income derived from the water rates, will be sufficient to pay the current annual expenses of operating its water works, and the interest as it accrues on the bonds, notes and scrip issued as aforesaid by said city, and to make such contributions to the sinking fund and payments on the principal as may be required under the provisions of this act.

SECT. 9. Whoever wilfully or wantonly corrupts, pollutes or diverts any of the waters taken or held under this act, or injures any structure, work or other property owned, held or used by said city under the authority and for the purposes of this act, shall forfeit and pay to said city three times the amount of damages assessed therefor, to be recovered in an action of tort; and upon conviction of either of the above wilful or wanton acts shall be pun-
38 ished by a fine not exceeding three hundred dollars, or by imprisonment not exceeding one year.

SECT. 10. The powers and duties granted to and imposed upon the City of Newburyport by this act shall be exercised by a board of water commissioners, consisting of five residents of the city, to be appointed by the mayor with the approval of the city council. Said commissioners shall be appointed and hold their office from the time of their appointment and approval, for the terms of one, two, three, four and five years, respectively, from the first Monday of May next following their appointment; and thereafter one commissioner shall be appointed each year for the term of five years from the first Monday in May. All such commissioners, except in a case of removal, shall hold office until their successors are appointed in their stead. Vacancies occurring during the term may be filled for the remainder of the term. No person shall be appointed commissioner who holds, at the time, any city office by popular election. Any commissioner, after due notice and hearing, may be removed at any time by a two-thirds vote of each branch of the city council, for any cause which shall be deemed sufficient, and shall be expressed in the vote of removal. The commissioners shall receive no compensation for their services unless the city council by a two-thirds vote of each branch thereof otherwise determine, and in such case the amount of compensation may be fixed by a like two-thirds vote.

SECT. 11. The water commissioners shall fix such prices or rents for the use of water as shall produce annually, as near as may be, a net surplus equal to two per centum of the total amount of the bonds, notes and scrip issued under this act, after paying all current expenses of operating the water works and interest upon loans, and after the payment of all expenses for new construction not exceeding ten thousand dollars in any one year. The commissioners of sinking funds of the city of Newburyport shall be trustees of a sinking fund which shall be set apart for the payment and redemption of said water loan, and which shall remain inviolate and

pledged to the payment of said loan and shall be used for no other purpose. The net surplus aforesaid shall be paid into the sinking fund, and if said surplus does not equal two per centum of the total amount of the bonds, notes and scrip issued under this act, the city shall raise by general taxation a sum which with the surplus shall equal said two per centum, and shall contribute said sum to the sinking fund. The commissioners shall annually, and as often as the city council may require, render an account of all their doings in relation to the sinking fund, and shall be governed by the provisions of section eleven of chapter twenty-nine of the Public Statutes, except as herein otherwise provided.

SECT. 12. At any time within sixty days after the passage of this act, and not after sixty, the Newburyport Water Company may notify the mayor of Newburyport in writing that it desires to sell to said city its corporate property and all the rights and privileges of said company, and execute and deliver to said city proper deeds and instruments in writing, conveying to said city the property aforesaid; *provided, however*, the legal voters of the city of Newburyport, at legal meetings to be called in the several wards of said city within six months after said notification has been received as aforesaid, shall, by a majority vote of the voters of said city present and voting thereon at such meetings, vote to purchase the aforesaid property upon the terms and conditions contained in this section, whereupon the property thus conveyed shall become the property of the City of Newburyport, and said city shall be liable to pay to said company the fair value of the property thus conveyed; and in case the said city and the said company shall be unable to agree upon the value of said property, the supreme judicial court may, upon application of either party and notice to the other, appoint three commissioners, one of whom shall be a skilled engineer, and one learned in the law, who shall determine the fair value of said property conveyed as aforesaid, and whose award when accepted by the court shall be final.

SECT. 13. After the vote provided for in section twelve of this act, or provided the Newburyport Water Company does not so notify the said mayor within said sixty days, this act shall be submitted to the legal voters of the city of Newburyport for their acceptance or rejection, at legal meetings to be called in the several wards of said city within eight months from the passage of this act, and shall take effect from and after its acceptance by a two-thirds vote of the voters of said city present and voting thereon at such meetings. The vote shall be by separate ballot, and the ballot shall be Yes, or No, in answer to the question, "Shall the City of Newburyport accept chapter — of the Acts of eighteen hundred and ninety-three, authorizing the City of Newburyport to establish and maintain a system of water supply for domestic and other uses?" This act shall be void if not accepted by said vote.

Approved June 10, 1893.

Exhibit F.

To the honorable senate and house of representatives of the Commonwealth of Massachusetts, in general court assembled:

The undersigned petitioner, The Newburyport Water Company, respectfully represents:

That it is a corporation duly established by virtue of the provisions of chapter 235 of the Acts of the year 1880; that the City of Newburyport has voted to accept the provisions of chapter 471 of the Acts of the year 1893, and, by virtue of the authority conferred upon it by said act, to establish independent works to supply water to itself and its inhabitants, and not to purchase the property and privileges of your petitioner as it was authorized to do by said act. And your petitioner says that if said city proceeds to establish such independent supply, the property and franchise of your petitioner will be greatly injured in value and may be rendered substantially worthless; and that your petitioner's plant and property was obtained for the express purpose of furnishing such supply of water, and is well adapted and has been thus far used therefor.

And your petitioner further represents that there is doubt whether the provisions of chapter 471 of the Acts of the year 1893 are adequate to enable your petitioner to obtain compensation for the injury which may be done to your petitioner by said city.

Wherefore your petitioner prays for the passage of an act providing and requiring that said city shall, before proceeding to supply water to itself or its inhabitants under the authority of said chapter 471, purchase the franchise, property and all the rights and privileges of your petitioner, and that your petitioner be author-
41 ized to make sale thereof; or that in some other suitable way your petitioner may be compensated for said threatened damage by said city.

THE NEWBURYPORT WATER COMPANY,
By JOHN E. McCUSKER, *Sup't.*

Exhibit G.

An act to provide for the purchase of the property of the Newburyport Water Company by the City of Newburyport.

Be it enacted, etc., as follows:

Section 1. The City of Newburyport shall, before proceeding to supply water to itself or its inhabitants under the authority of chaptor four hundred and seventy-one of the Acts of the year one thousand eight hundred and ninety-three, purchase from the Newburyport Water Company the franchise, corporate property and all the rights and privileges of said Newburyport Water Company, and

said Newburyport Water Company is authorized to make sale of the same to said city. The compensation to be paid by said city to said company shall be determined by three commissioners to be appointed by the supreme judicial court, upon application of either party and notice to the other, whose award, when accepted by said court, shall be binding upon all parties.

SECT. 2. Upon petition by said Newburyport Water Company, the supreme judicial court shall have jurisdiction in equity, if said city shall proceed to supply itself or its inhabitants with water before making the purchase aforesaid, to enjoin said city from so doing until it shall have made said purchase, and to compel it to make said purchase.

EXHIBIT H.

Acts and Resolves Passed by the General Court of Massachusetts for the Year 1894.

Chapter 474.

An act to provide for the purchase of the property of the Newburyport Water Company by the City of Newburyport.

Be it enacted, etc., as follows:

SECTION 1. If, within thirty days after the passage of this act, the Newburyport Water Company shall notify the mayor of the
42 city of Newburyport, in writing, that it desires to sell to said city all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water, said city shall not proceed to supply water to itself or its inhabitants under the authority of chapter four hundred and seventy-one of the Acts of the year eighteen hundred and ninety-three, unless it shall have first purchased of said company the property aforesaid; and said company is authorized to make sale of said property to said city, and said city is authorized to purchase the same. Whenever said city shall, by a majority vote of the legal voters of said city present and voting thereon at a meeting called for that purpose, vote to purchase said property, notice of the desire of said company to sell the same having been given as hereinbefore provided, said company shall, within twenty days after the vote aforesaid, execute and deliver to said city proper deeds and instruments in writing, conveying to said city the property aforesaid, and said property thus conveyed shall thereupon become the property of said city, and said city shall pay to said company the fair value thereof, to be ascertained as hereinafter provided. If at the first meeting a majority of the voters present and voting do not vote to purchase said property, other meetings may be called and held therefor. In case the said city and the said company shall be una-

ble to agree upon the value of said property, the supreme judicial court shall, upon application of either party and notice to the other, appoint three commissioners, two of whom shall be skilled engineers and the third learned in the law, who shall determine the fair value of said property for the purposes of its use by said city, and whose award, when accepted by the court, shall be final. Such value shall be estimated without enhancement on account of future earning capacity or good will, or on account of the franchise of said company.

SECT. 2. In case said Newburyport Water Company shall convey its property to the City of Newburyport, in accordance with the provisions of the preceding section, said city shall manage and use the property thus conveyed for the purposes and under the pro-
43 visions of chapter four hundred and seventy-one of the Acts of the year eighteen hundred and ninety-three.

SECT. 3. The said city may, for the purpose of paying the necessary expenses and liabilities incurred under the provisions of this act, issue from time to time bonds, notes or scrip to an amount sufficient for such purpose; such bonds, notes or scrip shall bear on their face the words, "Newburyport water loan," shall be payable at the expiration of periods not exceeding thirty years from the date of issue, shall bear interest payable semi-annually at a rate not exceeding six per centum per annum, and shall be signed by the treasurer of the city and countersigned by the water commissioners provided for by chapter four hundred and seventy-one of the Acts of the year eighteen hundred and ninety-three. The said city may sell such securities at public or private sale, or pledge the same for money borrowed for the purposes of this act, upon such terms and conditions as it may deem proper, provided that such securities shall not be sold for less than the par value thereof. The city shall provide at the time of contracting said loan for the establishment of a sinking fund, and shall annually contribute to such fund a sum sufficient with the accumulations thereof to pay the principal of such loan at maturity. The said sinking fund shall remain inviolate and pledged to the payment of said loan, and shall be used for no other purpose.

SECT. 4. In case said city shall, in violation of section one of this act, proceed to supply itself or its inhabitants with water before making the purchase aforesaid, the supreme judicial court shall, upon petition of said company, have jurisdiction in equity to enjoin said city from so doing until it shall have made such purchase.

SECT. 5. This act shall take effect upon its passage.

Approved June 14, 1894.

EXHIBIT I.

JULY 10, 1894.

Hon. Orrin J. Gurney, mayor of the city of Newburyport.

SIR: The Newburyport Water Company hereby notifies you that it desires to sell to the City of Newburyport all the
44 rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said company, and used in supplying said city and the inhabitants thereof with water.

This notice is given in accordance with the provisions of section one of chapter four hundred and seventy four of the Acts of the Legislature of Massachusetts for the year eighteen hundred and ninety-four, and a copy of the vote of the company under which I am authorized to give said notice is hereto annexed.

Very respectfully, JOHN E. McCUSKER,
Clerk Newburyport Water Company.

At a meeting of the Newburyport Water Company duly called for the purpose of considering that question, and notified as provided in article 5 of the by-laws, and held at Fraternity hall, Newburyport, Mass., on Tuesday, the tenth day of July, A. D. 1894, at ten o'clock in the forenoon, the following vote was passed:

Voted, That this company desires to sell to the City of Newburyport, Mass., all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water, and John E. McCusker, the clerk of the company, is hereby authorized and directed to notify the mayor of said city within thirty days from the fourteenth day of June, 1894, in writing that the company so desires, agreeably to the provisions of chapter 474 of the Acts of the Legislature of Massachusetts for the Year 1894, and the president and treasurer of said company are hereby authorized and directed, in case said city shall vote to purchase said property as provided by said act, to execute and deliver to said city, within twenty days after said vote of said city, proper deeds and instruments in writing, conveying to said city the property aforesaid.

JOHN E. McCUSKER, *Clerk.*

45 EXHIBIT J.

Know all men by these presents, that whereas the Newburyport Water Company, a corporation duly organized under the laws of this Commonwealth, and having its place of business in the City of

Newburyport, in the county of Essex, in said Commonwealth, has heretofore, in accordance with chapter 474 of the Acts of the Legislature of Massachusetts for the Year 1894, entitled "An act to provide for the purchase of the property of the Newburyport Water Company by the City of Newburyport," duly notified the mayor of said City of Newburyport in writing that it desired to sell to said city all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water; and whereas said city, in accordance with said act, voted to purchase said property of said company;

Now, therefore, said Newburyport Water Company, in compliance with said act and in consideration of the compensation provided for by said act to be paid to it by said City of Newburyport, hereby doth grant, remise, release, and forever quit-claim unto the said City of Newburyport all said property, a description whereof follows, namely:

1. All the waters of the brook running from Bartlett springs, so called to the Merrimac river and through the two following described parcels of land, and all the waters within or upon said land, and all the waters that may or can be obtained therein or can be used or conveyed therefrom. Said land is bounded and described as follows: two parcels of real estate or land situate in said Newburyport near Bartlett springs, so called. The first parcel of land or real estate is bounded and described as follows: Beginning at a point on the southerly side of Spring lane and the southerly end of a culvert through which the brook runs which discharges the water from the Bartlett springs, thence following the southerly and westerly side of said Spring lane south $31\frac{3}{4}°$ east $57\frac{6}{10}$ feet, thence south 18° east 97 feet, thence south $15\frac{1}{2}$ east $92\frac{7}{10}$ feet, thence south 9° east 68 feet, thence south 9° west $19\frac{5}{10}$ feet, thence south 46 62° west 36 feet to a stake on the westerly line of Spring lane and 18 feet from a branch of said brook, thence north 69° west 135 feet to a large poplar tree, thence north 62° west 243 feet to an apple tree, thence north 42° west $303\frac{5}{10}$ feet to a stake by the fence between said land and land of L. & E. L. Bartlett, thence by said fence and Bartlett's land north $43\frac{1}{2}°$ east 208 feet to a stake by said fence 100 feet beyond the brook, thence south 50° east $248\frac{4}{10}$ feet, thence south 58° west 50 feet to a large willow tree on the southerly side of Spring lane, thence by the southerly side of Spring lane to the point of beginning, containing $3\frac{3}{4}$ acres. The second parcel of land or real estate is bounded and described as follows: Beginning at the northerly side of Spring lane and the northerly end of the culvert named in the foregoing description, and thence by the northerly side of said Spring lane 198 feet to a willow tree, thence turning at a right angle and running to the Merrimac river to low water mark about 150 feet, thence by said river to the brook first mentioned, thence by said brook to the point of beginning, containing $\frac{3}{4}$ of an acre more or less. Said parcels of land or real estate

and said waters having been taken by said company in the exercise of the right of eminent domain from John L. Moulton.

2. The parcels of land described in the preceding paragraph. Also the following property, whether included in said land or not: (1) The pumping station, consisting of a brick building and coal shed connected therewith upon the lot of land first described in item one herein; (2) the pumps, engines and all appliances, fixtures, fittings and appurtenances contained in said pumping station building, including three boilers (two of which are in use), with the foundations, settings, connections, fittings and fixtures thereof in said pumping station building; (3) four wells with suction pipes, foot-valves and driven pipes within or connected therewith upon the land first described in item one herein; (4) the dam, gates and appliances connected therewith situate upon the land first described in item one herein; (5) the pond upon land first described in item one herein; (6) four filters, with all gates, pipes, appliances and appurtenances connected therewith or belonging thereto, situate upon the second lot of land described in item one herein; (7) a clear water wall, with suction pipe, foot-valves, and appur-
47 tenances on the second lot of land described in item one herein; (8) all suction pipes, gates, fittings, appliances, and appurtenances other than those hereinbefore described, situate upon both said lots of land described in item one herein.

3. A certain parcel of land, with a tenement house and barn thereon, situate on said Spring lane, bounded and described as follows: Northerly by the public landing and the Merrimac river; westerly by the road leading to Bartlett's avenue, known as Spring lane; easterly and southerly by land described in item four herein.

4. A certain parcel of land situate on said Spring lane, bounded by said lane, by land now or late of Henry Jackman, by land now or late of the heirs of David Jackman, by the Merrimac river, and by land described in item three herein.

5. A certain parcel of land situate in that part of Newburyport known as Belleville, containing $58\frac{45}{100}$ square rods, described as follows: Beginning at a post at the northerly corner of said parcel and at the northwesterly corner of land now or late of William M. Hopkinson, and a two-rod lane adjoining said land of Hopkinson and leading to High street, said post being 247½ feet south, 74½° west from the line of said High street, thence south 28½° east 178½ feet by land of said Hopkinson and land now or late of James M. Morse to land now or late of the city of Newburyport, thence by said land of said city south 77½° west 100 feet to a stake and stones, thence north 28½° west by land now or late of Hale 153 feet to a stake and stones at the extension of said two-rod lane, thence north 62° east 96 feet to the point of beginning, together with a right of way over said lane and extension, and the right to dig up the same and lay pipes thereunder, the owner of said land being bound to build and maintain all fences. Including the standpipe and its foundations, with all gates, valves, fixtures, appliances and appur-

tenances used or connected therewith, situate upon land described in item five herein.

6. The right to lay and maintain pipes in and through a certain strip or parcel of land in said Newburyport, being a part of a certain field situate upon the southwest side of High street, in that part of said Newburyport which is known as Belleville. Said strip being twelve feet in width, and beginning at the gate on High
48 street, thence continuing through the centre of the field to the land of said Newburyport Water Company described in item five herein, with the right to enter at any time upon said strip for the purpose of laying, relaying or repairing said pipe, or doing any acts necessary and proper for the maintenance of said pipes, reference being had to a grant from Charles H. Ireland *et al.* to said company, dated April 21, 1881, recorded with Essex Deeds, South District, Book 1057, leaf 12.

7. The right to lay and maintain pipes in and through a certain strip of land owned on Sept. 4, 1891, by Philip D. Adams, and situate near the electric power station in said Newburyport, said strip being at said date open and used as a way by one Allen and others; subject to the obligation of the grantee to keep said way in good and passable condition at all times, and to hold said Adams harmless from any damage or injury which may result from bursting, settling or other casualty in connection with said pipes; the same having been conveyed by said Adams to said company on said date, by a paper writing now at the office of said company, number two Bartlett street, in said Newburyport.

8. The dam, building, engine, boiler, feed-pump, well, suction pipe, and any and all fixtures and appliances connected with said dam, building, engine, boiler, pump, well or pipe situate upon land of Henry M. Jackman, about fifteen hundred feet southeasterly of said pumping station building; also about fifteen hundred feet wrought iron five-inch pipe, extending from said building to said pumping station building, and all gates, check-valves, appliances and fixtures connected with said pump.

9. The twelve-inch cast-iron force-main pipe, about 7976 feet in length, extending from said main pumping station building through Spring lane, Ferry road, High street, and thence across land described in item six herein to the stand-pipe situated upon land described in item five herein, with all gates, branches, fixtures, appliances and appurtenances connected with said force-main pipe or in use therewith; three hundred and seventy-six feet of said force-main pipe, namely, that portion thereof extending from said stand-pipe to said High street, being also used as a leading main.

10. All distribution pipes and all gates, connections, appli-
49 ances and appurtenances connected therewith, laid and maintained in the streets of said Newburyport, and used by said company for the supply of water, as follows: (The lengths may vary slightly from the figures given.)

(1.) Ten thousand feet of twelve-inch cast-iron distribution pipe,

laid from the gate near said stand-pipe, through High and State streets to Market square.

(2.) Eighteen hundred and eighty-one feet of eight-inch cast-iron pipe, laid in High street between State and Lime streets.

(3.) Twenty-nine hundred and sixty-eight feet of eight-inch cast-iron pipe, laid in Merrimac street, between Market square and Kent street.

(4.) Seventy-six hundred and thirty feet of eight-inch wrought-iron, cement-lined pipe, laid in Merrimac street, from building known as Bayley hat shop to Chain bridge, and from junction of Merrimac and Spofford streets through Spofford street to Ferry road, or High street.

(5.) Three hundred and forty feet of eight-inch wrought-iron cement-lined pipe, laid in Union street, from Goodwin's avenue to the gas house.

(6.) Fifteen hundred and ninety-three feet of six-inch cast-iron pipe, laid in Ashland street, between High and Merrimac streets.

(7.) Thirteen hundred and forty-three feet of six-inch cast-iron pipe, laid in Boardman street, between High and Merrimac streets.

(8.) Sixteen hundred and twenty-five feet of six-inch cast-iron pipe, laid in Broad street, between High and Merrimac streets.

(9.) Two thousand and fifty-two feet of six-inch cast-iron pipe, laid in Bromfield street, between High and Merrimac streets.

(10.) Two thousand and ninety three feet of six-inch cast-iron pipe, laid in Federal street, between High and Merrimac streets.

(11.) One thousand four hundred and six feet of six-inch cast-iron pipe, laid in Green street, between High and Merrimac streets.

(12.) One thousand seven hundred and eighteen feet of six-inch cast-iron pipe, laid in Kent street, between High and Merrimac streets.

(13.) Two thousand one hundred and twenty-five feet of six-inch cast-iron pipe, laid in Lime street, between High and Merrimac streets.

50 (14.) One thousand one hundred and eighty-seven feet of six-inch cast-iron pipe, laid in Market street, between High and Merrimac streets.

(15.) Sixteen hundred and twenty-five feet of six-inch cast-iron pipe, laid in Oakland street, between High and Merrimac streets.

(16.) Twelve hundred and eighteen feet of six-inch cast-iron pipe, laid in Winter street, between High and Merrimac streets.

(17.) Ten hundred and sixty-two feet of six-inch cast-iron pipe, laid in Pleasant street, between State and Titcomb streets.

(18.) Fifteen hundred and thirty-one feet of six-inch cast-iron pipe, laid in Fair street, between Prospect and Water streets.

(19.) Six hundred and twenty-five feet of six-inch cast-iron pipe, laid in Fruit street, between High and Prospect streets.

(20.) Six hundred and ninety-seven feet of six-inch cast-iron pipe, laid in Harris street, between Green and State streets.

(21.) Sixteen hundred and thirty-two feet of six-inch cast-iron pipe, laid in High street, between Lime and Marlboro streets.

(22.) Thirteen hundred and twelve feet of six-inch cast-iron pipe, laid in Liberty street, between State and Federal streets.

(23.) Forty-two hundred and twenty-seven feet of six-inch cast-iron pipe, laid in Merrimac street, between Kent street and hat factory building.

(24.) Fifteen hundred and ninety-three feet of six-inch cast-iron pipe, laid in Monroe street, between Kent and Oakland streets.

(25.) Twenty-six hundred and eighty-seven feet of six-inch cast-iron pipe, laid in Prospect street, between State and Bromfield streets.

(26.) Twenty-six hundred and twenty-five feet of six-inch cast-iron pipe, laid in Washington street, between Green and Kent streets.

(27.) Twenty-two hundred and ninety-three feet of six-inch cast-iron pipe, laid in Water street, between Market square and Lime street.

(28.) Seven hundred and fifty feet of six-inch cast-iron pipe, laid in Purchase street between Lime and Bromfield streets.

(29.) Four hundred and fifty feet of six-inch cast-iron pipe, laid on Ferry wharf, from Market square to the coal pocket.

51 (30.) Two hundred and fifty feet of six-inch wrought-iron cement-lined pipe, laid in Auburn street, between High and Vernon streets.

(31.) Fifteen hundred and ninety-three feet of six-inch wrought-iron cement-lined pipe, laid in Forrester street, between High and Merrimac streets.

(32.) Twenty-three hundred and twelve feet of six-inch wrought iron cement-lined pipe, laid in Marlboro street, between High and Water streets.

(33.) Five hundred and thirty-one feet of six-inch wrought-iron cement-lined pipe, laid in Greenleaf street, between State and Dalton streets.

(34.) Thirteen hundred and twelve feet of six-inch wrought-iron cement-lined pipe, laid in Middle street, between State and Federal streets.

(35.) Ten hundred and sixty-two feet of six-inch wrought-iron cement-lined pipe, laid in Purchase street, between Marlboro and Lunt streets.

(36.) One hundred and fifty-six feet of six-inch wrought-iron cement-lined pipe, laid in Vernon street, commencing at Auburn street.

(37.) Twenty-five hundred and thirty-one feet of six-inch wrought-iron cement-lined pipe, laid in Water street, between Marlboro and Lime streets.

(38.) Seven hundred feet of six-inch wrought-iron cement-lined pipe, laid in Union street, between Marlboro street and Goodwin avenue.

(39.) Eleven hundred and forty feet of six-inch wrought-iron cement-lined pipe, laid in Hancock street, between Bromfield and Marlboro streets.

(40.) Twenty-two hundred and fifty feet of six-inch wrought-iron

cement-lined pipe, laid in Toppan street, between High and Low streets.

(41.) Eighteen hundred feet of six-inch wrought-iron cement-lined pipe, laid in North Atkinson street, between High street and almshouse.

(42.) Twenty-five hundred and forty-seven feet of six-inch
52 wrought-iron cement-lined pipe laid in State street, between High and Parker streets.

(43.) Seven hundred and eighty-one feet of four inch cast-iron pipe, laid in Beck street, between High and Washington streets.

(44.) One hundred and eighty-one feet of six-inch wrought-iron cement-lined pipe, laid in Inn street, between Pleasant street and just above Bartlett's.

(45.) Seven hundred and twenty-eight feet of four-inch cast-iron pipe, laid in Beck street, between Federal and Lime streets.

(46.) Sixteen hundred and twenty-five feet of four-inch cast iron pipe, laid in Carter street, between High and Merrimac streets.

(47.) Seven hundred and eighteen feet of four-inch cast-iron pipe, laid in Congress street, between Olive and Kent streets.

(48.) Four hundred and sixty-eight feet of four-inch cast-iron pipe, laid in Court street, between High and Washington streets.

(49.) Eight hundred and forty-three feet of four-inch cast-iron pipe, laid in Dove street, between Munroe and Merrimac streets.

(50.) Four hundred and sixty-eight feet of four-inch cast-iron pipe, laid in Dalton street, between Greenleaf and Hill streets.

(51.) Six hundred and fifty-six feet of four-inch cast-iron pipe, laid in Essex street, between State and Fair streets.

(52.) Three hundred and seventy-five feet of four-inch cast-iron pipe, laid in Greenleaf street, between Pond and Dalton streets.

(53.) Three hundred and forty-three feet of four-inch cast-iron pipe, laid in Hale's court, between Pleasant street and Prince place.

(54.) One hundred and seventy-eight feet of four-inch cast-iron pipe, laid in Milk street, between Lime street and a point opposite Bayley's greenhouse.

(55.) Fourteen hundred and thirty-seven feet of four-inch cast-iron pipe, laid in Olive street, between High and Merrimac streets.

(56.) Seven hundred and fifty feet of four-inch cast-iron pipe, laid in Pond street, between High and Greenleaf streets.

(57.) Four hundred and six feet of four-inch cast-iron pipe, laid in Prince's place, between State street and Hale's court.

(58.) Three hundred and seventy-five feet of four-inch cast-iron pipe, laid in Purchase street, between Bromfield and Lunt streets.

53 (59.) Three hundred and twelve feet of four-inch cast-iron pipe, laid in School street, from Federal street to the schoolhouse.

(60.) Seven hundred and eighty-one feet of four-inch cast-iron pipe, laid in Strong street, between Washington and Merrimac streets.

(61.) Eleven hundred and eighty-seven feet of four-inch cast-iron pipe, laid in Summer street, between High and Merrimac streets.

(62.) Six hundred and fifty-seven feet of four-inch cast-iron pipe, laid in Temple street, between State and Fair streets.

(63.) Sixteen hundred and fifty-six feet of four-inch cast-iron pipe, laid in Tyng street, between High and Merrimac streets.

(64.) Eight hundred and twelve feet of four-inch cast-iron pipe, laid in Warren street, between Munroe and Merrimac streets.

(65.) Fifteen hundred and ninety-three feet of four-inch cast-iron pipe, laid in Woodland street, between High and Merrimac streets.

(66.) Three hundred and ninety feet of four-inch cast-iron pipe, laid in Inn street, from Market square to just above Bartlett street.

(67.) Six hundred and fifty-six feet of four-inch wrought-iron cement-lined pipe, laid in Allen street, between High and Prospect streets.

(68.) Six hundred and twenty-five feet of four-inch wrought-iron cement-lined pipe, laid in Atwood street, between Federal and Lime streets.

(69.) Eight hundred and twelve feet of four-inch wrought-iron cement-lined pipe, laid in Charles street, between Purchase and Water streets.

(70.) Six hundred and fifty-six feet of four-inch wrought-iron cement-lined pipe, laid in Charter street, between State and Fair streets.

(71.) Seven hundred and eighty-one feet of four-inch wrought-iron cement-lined pipe, laid in Franklin street, between Purchase and Water streets.

(72.) Seven hundred and eighteen feet of four-inch wrought-
54 iron cement-lined pipe, laid in Harrison street, between Purchase and Water streets.

(73.) Three hundred and seventy-five feet of four-inch wrought-iron cement-lined pipe, laid in Lunt street, between Purchase and Hancock streets.

(74.) Seven hundred and eighty-one feet of four-inch wrought-iron cement-lined pipe, laid in Merrill street, between Congress and Merrimac streets.

(75.) Twelve hundred and fifty feet of four-inch wrought-iron cement-lined pipe, laid in Milk street, from Bromfield street to a point opposite Bayley's greenhouse.

(76.) Six hundred and twenty-five feet of four-inch wrought-iron cement-lined pipe, laid in Orange street, between Fair and Federal streets.

(77.) Four hundred and sixty-eight feet of four-inch wrought-iron cement-lined pipe, laid in Park street, between High and Harris streets.

(78.) Six hundred and fifty-six feet of four-inch wrought-iron cement-lined pipe, laid in Parsons street, between high and Prospect streets.

(79.) Seven hundred and eighty-one feet of four-inch wrought-iron cement-lined pipe, laid in Salem street, between Purchase and Water streets.

(80.) Three hundred and forty-three feet of four-inch wrought-iron

cement-lined pipe, laid in School street, from point opposite schoolhouse to Lime street.

(81.) Six hundred and twenty-five feet of four-inch wrought-iron cement-lined pipe, laid in Spring street, between Fair and Federal streets.

(82.) Five hundred and ninety-three feet of four-inch wrought-iron cement-lined pipe, laid in Temple street, between Fair and Federal streets.

(83.) Two hundred and thirty-seven feet of two-inch wrought-iron cement-lined pipe, laid in Atkinson street, between Boardman and Strong streets.

(84.) Three hundred and twelve feet of two-inch wrought-
55 iron cement-lined pipe, laid in Pleasant street, between Titcomb and Market streets.

(85.) Three hundred and forty-four feet of two-inch wrought-iron cement-lined pipe, laid in Garden street, between State and Otis streets.

(86.) Two hundred and sixty feet of two-inch wrought-iron cement-lined pipe, laid in Hill street, between Pond and Dalton streets.

(87.) Seven hundred and fifty feet of two-inch wrought-iron cement-lined pipe, laid in Jefferson street, between Oakland and Woodland streets.

(88.) Five hundred and seventy-seven feet of two-inch wrought-iron cement-lined pipe, laid in Ship street, between Water and Beck streets.

(89.) Five hundred and thirty-seven feet of two-inch wrought-iron cement-lined pipe, laid in Willow avenue, between High and Maple streets.

(90.) Two hundred and forty-five feet of two-inch wrought-iron cement-lined pipe, laid on Lunt's wharf, commencing at Merrimac street.

(91.) Two hundred and forty feet of two-inch wrought-iron cement-lined pipe, laid in Ocean street, between Carter and Warren streets.

(92.) Nine hundred and fifty-six feet of two-inch wrought-iron cement-lined pipe, laid in Union street, from Marlboro street to a point opposite gas house.

(93.) Two hundred and thirty-six feet of two-inch wrought-iron cement-lined pipe, laid in Elbow lane, between Water and Centre streets.

(94.) Seven hundred and fifty feet of two-inch wrought-iron cement-lined pipe, laid in Walnut street, between Woodland and Oakland streets.

(95.) One hundred and twenty feet of two-inch wrought-iron cement-lined pipe, laid in Franklin street, between Purchase and Milk streets.

(96.) Seven hundred and two feet of two-inch wrought-iron
56 cement-lined pipe, laid in Magnolia street, between Chapel and Woodland streets.

(97.) Eight hundred and fifty-two feet of two-inch wrought-iron cement-lined pipe, laid in Chapel street, between High and Howard streets.

(98.) Two hundred and thirty feet of two-inch wrought-iron cement-lined pipe, laid in Maple street, between Forrester and Chapel streets.

(99.) Three hundred and thirty feet of two-inch wrought-iron cement-lined pipe, laid in Dexter street, between Woodland and Beacon streets.

(100.) Eight hundred and eighty-eight feet of two-inch wrought-iron cement-lined pipe, laid in Summit street, commencing at High street.

(101.) One hundred and fifty-five feet of two-inch wrought-iron cement-lined pipe, laid in Dexter street, between Woodland and Beacon streets.

(102.) One hundred and thirty feet of two-inch wrought-iron cement-lined pipe, laid in Beacon street, between Dexter and Payson streets.

(103.) Three hundred feet of two-inch wrought-iron cement-lined pipe, laid in Jefferson street, commencing at Merrimac street.

(104.) One hundred and fifteen feet of two-inch wrought-iron cement-lined pipe, laid in Centre street, commencing at Liberty street.

(105.) Two hundred and eighty-five feet of two-inch wrought-iron cement-lined pipe, laid in Bromfield court, commencing at Bromfield street.

(106.) Seven hundred and thirty feet of two-inch wrought-iron cement-lined pipe, laid in Oak street, commencing at Marlboro street.

(107.) Three hundred and thirty feet of two-inch wrought-iron cement-lined pipe, laid in Neptune street, commencing at Purchase street.

(108.) Eight hundred and twenty-five feet of two-inch wrought iron cement-lined pipe, laid in Arlington street, commencing at High street.

57 (109.) Four hundred and fifty-five feet of two-inch wrought-iron cement-lined pipe, laid in South Pond street, commencing at Marlboro street.

(110.) Three hundred feet of two-inch wrought-iron cement-lined pipe, laid in Pine street, commencing at Marlboro street.

(111.) Fifteen hundred and fifty feet of two-inch wrought-iron cement-lined pipe, laid in High street, between Marlboro street and Old Town green.

(112.) Four hundred and forty feet of two-inch wrought-iron cement-lined pipe, laid on Water street, commencing at Marlboro street.

(113.) One hundred and eighty-five feet of two-inch wrought-iron cement-lined pipe, laid in Caldwell's court, commencing at Merrimac street.

(114.) Three hundred and sixty-five feet of two-inch wrought-

iron cement-lined pipe, laid in Johnson street, commencing at High street.

(115.) Eight hundred and fifty feet of two-inch of wrought-iron cement-lined pipe, laid in Barton street, between High and Chestnut streets.

(116.) One hundred and eighty-two feet of two-inch wrought-iron cement-lined pipe, laid in Bartlett street, between Inn street and water office.

(117.) Ninety-five feet of two-inch wrought-iron cement-lined pipe, laid in Threadneedle alley, commencing at Inn street.

(118.) One hundred feet of the one and one-half inch wrought-iron cement-lined pipe, laid in Allen street, commencing at Prospect street.

(119.) Eighty-six feet of one and one-half inch wrought-iron cement-lined pipe, laid in Bartlett street, commencing at the water office.

(120.) Three hundreed and thirty-three feet of one and one-half inch wrought-iron cement-lined pipe, laid in Beck street, between Federal and Ship streets.

(121.) Ten hundred and sixty feet of one and one-half inch wrought-iron cement-lined pipe, laid in Chestnut street, between Bromfield and Marlboro streets.

58 (122.) Seven hundred and sixty feet of one and one-half inch wrought-iron cement-lined pipe, laid in Eagle street, between Kent and Carter streets.

(123.) Three hundred and eighty-five feet of one and one-half inch wrought-iron cement-lined pipe, laid in Elm street, between Merrimac and Plum streets.

(124.) One hundred and seventy feet of one and one-half inch wrought-iron cement-lined pipe, laid in Goodwin street, commencing at Union street.

(125.) Five hundred and thirty feet of one and one-half inch wrought-iron cement-lined pipe, laid in Howard street, between Woodland street and Butler's court.

(126.) Three hundred and eighty-one feet of one and one half inch wrought-iron cement-lined pipe, laid in Inn street, between Market square and *Herald* building.

(127.) Three hundred and six feet of one and one-half inch wrought-iron cement-lined pipe, laid in Lowell's court, commencing at State street.

(128.) Two hundred and forty-eight feet of one and one-half inch wrought-iron cement-lined pipe, laid in Maple street, between Willow and Chapel streets.

(129.) One hundred and ninety-three feet of one and one-half inch wrought-iron cement-lined pipe, laid in Neptune street.

(130.) Forty-four feet of one and one-half inch wrought-iron cement-lined pipe, laid in Orange street, commencing at Fair street.

(131.) Three hundred and seventy-five feet of one and one-half inch wrought-iron cement-lined pipe, laid in Otis street, commencing at Prospect street.

(132.) Two hundred and fifty feet of one and one-half inch wrought-iron cement-lined pipe, laid in Pike street, commencing at Liberty street.

(133.) One hundred and thirty feet of one and one-half inch wrought-iron cement-lined pipe, laid in Plum street, between Olive and Elm streets.

(134.) Three hundred and fifty-eight feet of one and one-half inch wrought-iron cement-lined pipe, laid in Pond street, between Greenleaf and Hill streets.

59 (135.) Six hundred and seventy-five feet of one and one-half inch wrought-iron cement-lined pipe, laid in Russia street between Kent and Olive streets.

(136.) Five hundred and ninety-three feet of one and one-half inch wrought-iron cement-lined pipe, laid in Tremont street, between High and Prospect streets.

(137.) Five hundred feet of one and one-half inch wrought-iron cement-lined pipe, laid in Unicorn street, between Pleasant and Merrimac streets.

(138.) Fifty-five feet of one and one-half inch wrought-iron cement-lined pipe, laid in Vernon street, commencing at the end of the six-inch pipe.

(139.) Five hundred feet of one and one-half inch wrought-iron cement-lined pipe, laid in Warren street, between Munroe and Eagle streets.

(140.) One hundred and fifty-nine feet of one and one-half inch wrought-iron cement-lined pipe, laid in Toppan street, commencing at High street.

(141.) Two hundred and twenty-five feet of one and one-half-inch wrought-iron cement-lined pipe, laid in Franklin street, between Purchase and Milk streets.

(142.) Four hundred and twenty-five feet of one and one-half inch wrought-iron cement-lined pipe, laid in Smith's court, commencing at Water street.

(143.) Ninety feet of one-inch wrought-iron cement-lined pipe, laid in Bridge road, commencing at Merrimac street.

(144.) Eleven hundred and sixteen feet of one-inch wrought-iron cement-lined pipe, laid in Charter street, commencing at State street.

(145.) One hundred and twenty-nine feet of one-inch wrought iron cement-lined pipe, laid in Currier's court, commencing at Kent street.

(146.) Eighty feet of one-inch wrought-iron cement-lined pipe, laid in Middle street, commencing at State street.

(147.) Two hundred and twenty-two feet of one-inch wrought-iron cement-lined pipe, laid on Commercial wharf, commencing at Water street.

60 (148.) One hundred and twenty-eight feet of one-inch wrought-iron cement-lined pipe, laid in Cutter's court, commencing at Carter street.

(149.) One hundred and forty-five feet of one-inch wrought-iron

cement-lined pipe, laid in Boylston street, commencing at State street.

(150.) Two hundred and thirty-three feet of one-inch wrought-iron cement-lined pipe, laid in Ferry street, commencing at Water street.

(151.) Two hundred and eighty feet of one-inch wrought-iron cement-lined pipe, laid in Railroad avenue, commencing at Market street.

(152.) Sixty-four feet of one-inch wrought-iron cement-lined pipe, laid in Independent street, commencing at Liberty street.

(153.) One hundred and fifty feet of one-inch wrought-iron cement-lined pipe, laid in Pike street, commencing at the end of the one and one-half inch pipe.

(154.) Eighty-six feet of one-inch wrought-iron cement-lined pipe, laid in Jefferson street, commencing at the end of the one and one-half inch pipe.

(155.) Eighty-seven feet of one-inch wrought-iron cement-lined pipe, laid in Griffin's court, between Carter and Warren streets.

(156.) One hundred and fifty-five feet of one inch wrought-iron cement-lined pipe, laid in Papanti's court, commencing at Ocean street.

(157.) Two hundred and twelve feet of one-inch wrought-iron cement-lined pipe, laid in White's court, commencing at Merrimac street.

(158.) One hundred and twenty-five feet of one-inch wrought-iron cement-lined pipe, laid in Swap's court, commencing at Strong street.

(159.) One hundred and sixty-six feet of one-inch wrought-iron cement-lined pipe, laid in Brown's square, commencing at Green street.

(160.) One hundred and seventy-five feet of one-inch wrought-iron cement-lined pipe, laid in Town's court, commencing at Merrimac street.

61 (161.) Two hundred and fifty feet of one-inch wrought-iron cement-lined pipe, laid in Ashland court, commencing at Ashland street.

(162.) Two hundred and thirty-one feet of one-inch wrought-iron cement-lined pipe, laid in Coffin's court, commencing at High street.

(163.) One hundred and ninety feet of one-inch wrought-iron cement-lined pipe, laid in California street, between Merrimac and Water streets.

(164.) Fifty-two feet of one-inch wrought-iron cement-lined pipe, laid in Water street, commencing at the end of the two-inch pipe.

All as shown on the plan named in item 17 herein.

11. One hundred and sixty-six water gates upon said distribution pipes, the locations of which are shown upon said plan and in a record book named in item 20 herein.

12. One hundred and seventy-four fire hydrants connected with

said distribution pipe, the locations of which are shown upon said plan and record book.

13. Eight two-inch stand-pipes for supplying the street watering carts, located as follows:

One on Bromfield street, near High street; one on Federal street, near High street; one on State street, near High street; one on Market street, near High street; one on Kent street, near High street; one on Oakland street, near High street; one on Lunt's wharf, rear of market house; and one on Green street, below Pleasant. All as shown on said plan named in item 17 herein.

Twenty-two hundred and forty-six service pipes from said distribution mains to premises of consumers, with connections, fittings, valves, fixtures and appurtenances, the locations of which service pipes are shown in three application books and one service pipe record book, which books are named in item 16 herein. Said service pipe being numbered from one to twenty-two hundred and forty-six inclusive in said books, which books are now at the office of said company, at No. 2 Bartlett street, Newburyport.

15. The contract between said company and the City of Newburyport for supplying said city with water, dated Aug. 17, 1880, a copy of which contract is to be found upon page 362 of the municipal register of said city for the year 1893. Said contract being for the term of twenty years from Oct. 1, 1881.

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16. Three record books of applications for service pipe, marked "A," "B" and "C," respectively, and one service pipe record book containing a record of service pipes laid. Said books are now at the office of said company, at No. 2 Bartlett street aforesaid.

17. Plan of the water supply system of said company in said city, showing the location of said pumping station, stand-pipe, force and distribution mains and pipes, and locations of gates, valves and hydrants, entitled "Plan of Newburyport, Mass., with water distribution system of the Newburyport Water Company," scale one hundred and twenty-five feet to one inch; drawn by R. E. Curtis, dated 1886. Said plan being now at said company's office, at No. 2 Bartlett street.

18. Water rate register containing a list of the water takers of said company in said city, numbered one to twenty-seven hundred and twenty inclusive, with a record of the annual water rate paid by each taker, and the residence of such taker. Said register is now at said company's office at said No. 2 Bartlett street.

19. A meter register book showing a list of consumers taking water from said company by meter. Said book is now at the company's office.

20. A location record book showing the location of said gates, hydrants and pipes. Said book is now at said company's office.

21. Stock and construction tools in workshop at said No. 2 Bartlett street, Newburyport, as follows:

Three coffin hydrants, 1 Chapman hydrant, 1 Holyoke hydrant post, 31 one-inch stop and waste cocks, 141 corporation cocks, 70 service boxes, 35 yards rubber duck, 3 pairs rubber gloves, 2 six-

inch plugs, 1 eight-inch plug, 1 four-inch plug, 1 hand suction pump, 24 feet three-inch rubber suction hose, 3 rubber diaphragms for pump, 2 dozen files, 3 brass tops to hydrant spindles, 3 die stocks, 5 one-inch dies, 2 two-inch dies, 1 five-eighth inch die, 1 three-eighths inch die, 1 three-quarter inch die, 7 soldering irons, 250 one-inch couplings, 250 two-inch couplings, 150 one and one-half inch couplings, 18 three-quarter inch tees, 3 Johnson pumps, 50 feet one-eighth inch block tin pipe, 5 pipe-cutters, 2 pair pipe
63 tongs, 2 monkey wrenches, 1 coil one-fourth inch rope, 20 feet three-fourths inch lead pipe, 100 pounds solder, 1 box leather washers, 1 tool case, 3 tool wrenches, 2 hydrant wrenches, 2 spoons for cleaning out boxes, 1 iron bar, 2 tapping machines for cast-iron pipes, 4 four-inch iron sleeves, 1 six-inch iron sleeve, 1 eight-inch iron sleeve, 1 twelve-inch iron sleeve, 1 six-inch gate for cement pipe, 2 one and one-half Worthington meters, 2 three-quarter inch Crown meters, 1 one-half inch Crown meter, 1 set caulking tools, 1 dozen diamond points, 4 hand chisels, 1 street fire pot, 1 tool bench, 1 lining machine with cylinder and cones complete, 1 vise, 1 oiler, 1 oil can, 3 sets of cones for lining machine, 2 caulking hammers, 150 feet one-eighth inch wrought-iron pipe, 1 steel rod twenty-five feet long, 1 single block, 1 bow saw, 1 hand saw, 50 feet one-inch rope, 2 sieves, 5 picks, 27 shovels, 1 wooden horse, 3 tampers, 1 one-half barrels cement, 1 water tub, 1 dozen pick handles, 14 lanterns, 24 feet four-inch pipe, 25 feet six-inch pipe, 32 feet two-inch pipe, 25 feet one-inch pipe, 2 hoisting chains, 1 stove, 1 snow shovel, 2 brooms, 1 window washer, 25 pounds white lead, 1 solder mould, 2 feet two-inch lead pipe, 1 length six-inch sewer pipe, 1 furnace, 2 coal hods, 4 radiators, 1 iron gate, 1 mallet, 1 ratchet stock, 2 melting pots, 1 one and one-half inch union, 2 three-quarter inch unions, 2 dozen two-inch right and left couplings, 4 two-inch crosses, 3 winding sticks, 6 one and one-half inch elbows, 2 cement plugs, 4 water pails, 12 pounds jute, 2 pipe clamps, 1 fifty-foot tape, 150 pounds lead, 2 pounds resin, 1 bit stock, 1 zinc mat, gas fixtures in workshop.

22. Stock, supplies and tools at said pumping station buildings, as follows:

1 pair coal scales, 1 iron wheelbarrow, 3 wooden wheelbarrows, 1 two-foot stilson wrench, 1 fourteen-inch stilson wrench, 1 monkey wrench, 3 large gate wrenches, 2 sixteen foot ladders, 1 twelve-inch sleeve, 1 eight-inch sleeve, 1 six-inch elbow, 50 feet two-inch pipe, 75 feet one-inch pipe, 50 feet one-half inch pipe, 10 feet one-quarter inch brass pipe, 1 one and one-quarter inch valve, 1 one-inch union, 1 three-quarter inch union, 1 one-half inch union, 1 steam gauge, 1 water gauge, 1 vacuum gauge, 1 damper regulator, 2 steam
64 gauges, 1 fire alarm, 6 lamps and brackets, 9 curtains, 1 broom, 1 desk, 1 heater, 3 shovels, 3 picks, 2 tube cleaners, 2 pipe bars, 2 hoes for cleaning fires, 2 iron rakes, 1 oil can, 1 Crosby lubricator, with appliances, 1 large oil can, 2 small oil cans, 8 pounds Eureka packing, 20 gallons kerosene oil, 15 gallons cylinder oil, 2 gallons paint oil, 2 quarts spirits, 1 gallon

paint, 1 package of alabastine, 1 gallon japan, 1 two-inch tape, 1 two-inch die, 40 feet one-inch rope, 3 pounds waste, 1 lot two-inch plank, 1 light glass 12 x 18, 1 rain gauge, 5 feet sheet packing (rubber,) 4 one-quarter inch valves, 2 one and one-quarter inch tees, 3 two-inch elbows, 4 one-inch nipples, 2 three-inch elbows, 5 feet three-inch pipe, 1 two and one-half inch tee, 1 combination box, 1 three-eighth inch valve, 100 pounds white gravel for filter, 1 dozen bushings, about 75 tons Cumberland coal.

23. Construction tools owned by said company, described as follows:

(1.) Upon land owned by John Hoy, in said Newburyport, near Artichoke river:

One centrifugal pump, with 20 feet of pliable suction hose and proper discharge pipe fittings and appurtenances; 1 upright boiler, with smokestack and fittings; 18 picks, 18 shovels, 500 feet two-inch pipe, 100 feet five-inch pipe, 2 dozen two-inch elbows, 2 dozen two-inch couplings, 2 dozen two-inch nipples, driving weight and clamp for two-inch pipe, 2 hand pumps, 100 feet three-fourths inch pipe, 100 feet one-inch pipe, 2,000 feet loose lumber, board measure, 1 tool box.

(2.) Upon stand-pipe lot described in item 5 herein:

One twelve by eight branch, 9 twelve by four inch branches, 4 four by four branches, one twelve by twelve branch, 48 feet twelve-inch pipe, cast iron, 12 feet eight-inch pipe, cast iron, 1 twelve by eight inch tee, 1 twelve-inch elbow.

24. Office furniture and fixtures now at the office of said company, at said No. 2 Bartlett street, as follows:

Ten office chairs, 1 counter desk, 1 roll-top desk, 1 letter-press, 1 directors' table, 1 tapestry carpet, 1 clock, 1 couch, 1 feather duster, 1 counter rail, 1 letter box, 6 curtains, 1 case for papers and letters, 1 brush holder, 2 brushes, 1 desk stool, gas fixtures, 3 door mats, 11 towels, 1 bottle ink.

65 25. All the debts due said company from water takers, as shown by the books of the company herein named. Also all insurance policies of said company by which any of the property herein conveyed is insured against fire.

26. All the rights, privileges and easements heretofore acquired under chapter 235 of the Acts of the Legislature of Massachusetts for the Year 1880, and now used by said company, of laying and maintaining water pipes and mains in said streets, and of making connections therewith for the purpose of supplying said city and the inhabitants thereof with water, and all property, property rights, corporate property, privileges, easements, waters and water rights of said company, whether herein particularly described or not, and all the rights and franchises of said company, whether for supplying water to the city of Newburyport and the inhabitants thereof, and of collecting water rates therefor or otherwise.

Hereby conveying to said city all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools and all apparatus and appli-

ances owned by said company and used in supplying said city and the inhabitants thereof with water.

To have and to hold the granted premises, with all the privileges and appurtenances thereto belonging, to the said City of Newburyport, its successors and assigns, to its and their use and behoof forever, for the purposes authorized by law.

And the said Newburyport Water Company doth hereby covenant with the said City of Newburyport, and its successors and assigns, that the granted premises are free from all incumbrances made or suffered by it, and that it will, and its successors shall, warrant and defend the same to the said City of Newburyport and its successors forever against the lawful claims and demands of all persons claiming by, through or under it, but against none other.

In witness whereof the said Newburyport Water Company hath caused these presents to be signed in its name and behalf by W. Herbert Noyes, its president, and George H. Norman, Jr., its treasurer, thereto duly authorized by vote, a copy whereof is hereto annexed, and its corporate seal to be hereto affixed, this twenty-
66 ninth day of January, in the year of our Lord one thousand eight hundred and ninety-five.

THE NEWBURYPORT WATER COMPANY, [L. S.]
By W. HERBERT NOYES, *President.*
GEO. H. NORMAN, JR., *Treasurer.*

Executed in presence of
F. L. EVANS.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, ss:

JAN. 29, 1895.

Then personally appeared the above-named George H. Norman, Jr., treasurer, and acknowledged the foregoing instrument to be the free act and deed of the said Newburyport Water Company, before me,

F. L. EVANS,
Justice of the Peace.

COMMONWEALTH OF MASSACHUSETTS, *Essex*, ss:

JAN. 29, 1895.

Then personally appeared the above-named W. Herbert Noyes, president, and acknowledged the foregoing instrument to be the free act and deed of the said Newburyport Water Company, before me,

F. L. EVANS,
Justice of the Peace.

At a special meeting of the stockholders of the Newburyport Water Company, a corporation, duly called for the purpose, and

held at Newburyport on the tenth day of July, A. D. 1894, the following vote was passed:

"*Voted*, That this company desires to sell to the City of Newburyport, Mass., all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said company, and used in supplying said city and the inhabitants thereof with water, and John E. McCusker, the clerk of the company, is hereby authorized and directed to notify the mayor of said city, within thirty days from the fourteenth day of June, 1894, in
67 writing, that the company so desires, agreeably to the provisions of chapter 474 of the Acts of the Legislature of Massachusetts for the Year 1894, and the president and treasurer of said company are hereby authorized and directed, in case said city shall vote to purchase said property, as provided by said act, to execute and deliver to said city, within twenty days after said vote of said city proper deeds and instruments in writing, conveying to said city the property aforesaid."

Attest: JOHN E. McCUSKER,
Clerk of the Newburyport Water Company.

Exhibit K.

City of Newburyport.

In Board of Alderman, *Jan.* 31, 1895.

Present: His honor Mayor Gurney, Aldermen Noyes, Perkins, Kimball, Blumpey, Johnson and Hoyt.

No. 29.

On motion of Alderman Perkins: Ordered, the common council concurring, that the mayor be and hereby is authorized and instructed to accept, on behalf of the city, the conveyance and property of the Newburyport Water Company, as tendered by said company in accordance with chapter 474 of the Acts of 1894, upon the following terms:

To the Newburyport Water Company:

In accepting the conveyance made to the City of Newburyport by the Newburyport Water Company, dated Jan. 29, 1895, and delivered to the mayor on that day by the clerk of that corporation for examination, it is not admitted, on behalf of the city, that any franchise is acquired by the said city under such conveyance, or that the city is under any obligation to make payment on account of any franchise of said corporation by reason thereof.

It is further not admitted or claimed that the four filters, with their gates, pipes, appliances and appurtenances, described in item

2 of said deed, as situated upon the second lot of land described in item 1 therein, are used in supplying said city or its inhabitants with water, or that the city is bound to pay for the same or any part thereof.

It is further not admitted or claimed that the Newburyport Water Company has any right or authority to convey by said conveyance, or the City of Newburyport to accept or make payment for
68 anything whatsoever, except according to provisions of chapter 474 of the act of 1894.

Adopted by a unanimous yea vote, six aldermen present and voting. Came up from the common council indorsed, "Adopted in concurrence by a unanimous yea vote, fifteen members present and voting."

Attest:

[SEAL.] GEORGE H. STEVENS, *City Clerk.*

EXHIBIT L.

COMMONWEALTH OF MASSACHUSETTS:

NEWBURYPORT WATER COMPANY
v.
CITY OF NEWBURYPORT.

Decided by supreme judicial court of Massachusetts, June 14, 1897.

Copy of Opinion.

HOLMES, *J.:*

The price to be paid by the City of Newburyport to the Newburyport Water Company for what it purchases under statute 1894, chapter 474, is not left to the discretion of the commissioners. A rule is given to them by the statute, and it is not improper that the manner in which that rule has been interpreted and carried out should be reported for the supervision of this court before the acceptance of their report. Kingman, petitioner, 153 Mass. 566, 579. We are not disposed to criticise even the reporting of questions of evidence by agreement of parties, so far as it may seem possible that they had a substantial bearing upon the result. But we should not recommit the report upon a matter of evidence unless we could see some probability of an appreciable change in the report upon the correction of the mistake.

The chief complaint of the petitioner is that no allowance is made for its right to lay and maintain pipes in the streets and its right to collect water rates. There was much discussion whether these are among the "rights" which the city buys under sect. 1 of the
69 act, and, if so, whether they are embraced in the provision that the value of the property shall be estimated without enhancement on account of, among other things, the franchise of the

company. As bearing upon this there was a good deal of argument as to whether statute 1893, chapter 471, was in force, the city having voted not to purchase the petitioner's property as therein provided, but afterwards having voted to accept the act. We do not think it necessary to go into these considerations, or even to examine with great accuracy how far the rights in question have not been allowed for. The direction to "determine the fair value of said property for the purposes of its use by said city" is clear enough without going into controverted questions. Whatever the city purported to purchase, (see Abbot *v.* New York & New England Railroad, 145 Mass. 450, 453; State *v.* Sherman, 22 Ohio St. 411, 428; Coe *v.* Columbus, Piqua & Indiana Railroad, 10 Ohio St. 372, 387), the petitioner's right to lay pipes in the streets was of no use to the city. The city had that right by virtue of the legislative authority to furnish water. Water pipes are not an additional burden to the highway. Pierce *v.* Drew, 116 Mass. 75, 81, Lincoln *v.* Commonwealth, 164 Mass. 1, 10. And as soon as the city was authorized by the legislature to furnish water no one could complain if it proceeded to lay pipes for that purpose. Assuming that the act of 1893 was not in force, and admitting that a purchase from the petitioner was a condition precedent to the exercise of any rights under the act of 1894, still it is plain that when once the purchase was made, the act of 1894 conferred upon the city directly, and not merely or at all as successor to the water company, the right to supply itself and its inhabitants with water, as if under the act of 1893, in case the water company had not offered to sell under that act. A similar answer may be made with regard to the right to charge water rates. St. 1894, chap. 474, sect's 2, 4; St. 1893, chap. 471, sect's 1–3, 8, 13. "It is the statute, and not the company which originally constructed the (water works), which confers upon the local authority this right." Edinburgh Street Tramway Co. *v.* Edinburgh (1894), A. C. 456, 464, 465.

It must be remembered that the transaction before us springs out of a voluntary offer by the petitioner to sell upon the statutory
70 terms, and therefore there is no reason to try to bend those terms in its favor. Of course, an offer by a water company, made under the threat of municipal competition and to avoid ruin, might be voluntary only in name. But we have no reason to assume in this case that the petitioner is the victim of robbery, and must treat it as having acted of its free choice in fact as well as in form.

The other obbjection most insisted upon by the petitioner is the exclusion of evidence of its net earnings in the past. Had the evidence been admitted it is improbable that we should have recommitted the report on that ground. We are not disposed to recommit it because the evidence was excluded. The net income, no doubt, would be an indirect way of getting at the value of the capital in a transaction between individuals. It is not necessary to say that it would throw no light on the different question which the commissioners had to answer under the statute. But the question was a different one. Their duty was to find the fair value of the property for the purposes of its use by the city, and they were to find it with

out enhancement on account of future earning capacity or good will, or on account of the franchise of the company. It is doubtful whether the evidence would not be held inadmissible in England as an attempt to get an allowance for "future earning capacity," although the way in which these words are used in statute 1891, chapter 370, sect. 12, points to a narrow construction of them in the act before us. Edinburgh Street Tramway Co. *v.* Edinburgh (1894), A. C. 456, 466. In this country it has been said that basing the value upon earnings is in effect valuing a franchise which no longer exists. National Water Works Co. *v.* Kansas City, 62 Fed. Rep. 853, 864. Even in an ordinary transaction the test would not be past profits but market value, if that could be ascertained. Montgomery County *v.* Schuylkill Bridge Co., 110 Penn. St. 54, 60; *In re* Kensington & Oxford Turnpike Co., 97 Penn. St. 260; Stockton & Copperopolis Railroad *v.* Galgiani, 49 Cal. 139. Compare "fair market value for the purposes of its use." St. 1891, chap. 370, sect. 12. At all events, the different conditions under which the property would be used by a municipal corporation seeking only reimbursement,
71 not profit, so diminish the instructiveness of the figures offered that, even if admissible, we think that they ought not to have affected the result.

The commissioners state the elements of valuation which they have taken into account. In addition to the value of the tangible property and easements, they have allowed forty thousand dollars for the fact that the plant was a going concern and in full operation. They have allowed for everything for which the petitioner was entitled to be paid. They have approached the question in a manner in which it was within their discretion to approach it. National Water Works Company *v.* Kansas City, 62 Fed. Rep. 853. If capitalizing profits would give a much greater excess over the value of the land, water, easements and plant of the company than the commissioners allowed, the reasons are to be found in the franchise and monopoly of the company, in its right to lay pipes in the streets, and partly, perhaps, in the personal skill of the management, none of which are things for which the city is to pay.

The officer who made the tax returns setting forth the value of the stock of the company was called by the petitioner and testified to the value of the company's property. On cross examination, the respondent was allowed to identify the tax returns made by him, and to put them in. The returns had some tendency to show a smaller value of the property than that given on the stand by the witness, and so to contradict him, and were admissible on that ground, even if they did not amount to admissions by the corporation itself.

It appears to us questionable, at least, whether evidence that insurance rates were higher than the standard rates, and were advanced because of defects in the water system, would be admissible before a jury upon a question of value. Yet as an actual price paid in the market because of a specific fact, the objection to it is not that it is *res inter alios*, but rather that it is too remote from the question

at issue to give much help. See Call *v.* Allen, 1 Allen, 137, 144. We do not see how it could do any harm beyond tending to prove that the water works were not as good as the average; a fact which, if proved, hardly could affect a valuation arrived at as the commissioners arrived at it.

We are not prepared to say that the price of Mr. Norman's stock was inadmissible. But it gave a value for the total property
72 so far away from the award that it is not necessary to discuss the question, since it was not adopted as a standard.

The evidence of the sum paid Jackman by the city for the use of his spring, as bearing on the value of the water, does not appear to have been opened to the objection that his acceptance of it practically was compulsory, as in Cobb *v.* Boston, 112 Mass. 181, and Sawyer *v.* Boston, 144 Mass. 470. It seems not to have been very different from the price paid by the petitioner.

It was within the commissioners' power to award costs. Jones *v.* Carter, 8 Allen, 43; McLaughlin *v.* Old Colony Railroad, 166 Mass. 260.

Commissioners' award accepted.

73 *Amendment to Bill of Complaint.*

(Filed Sept. 1, 1897.)

Now comes the complainant, before answer is filed by the defendant, and amends its bill of complaint as follows:

1. In paragraph numbered 14, in the third line from the last of clause (*a*) thereof (printed page 18, line 13) strike out "5" and insert in lieu thereof "14" so that the phrase shall read, "and was in violation of article 14 of the amendments to the Constitution of the United States, and of plaintiff's rights thereunder."

2. By striking out clause (*b*) of said paragraph numbered 14, and inserting in lieu thereof the following:

"(*b.*) That by said legislation, as construed and applied as aforesaid, the State or Commonwealth of Massachusetts deprived and deprives plaintiff of its property without due process of law, in violation of said article 14 of amendments to the Constitution of the United States, and of plaintiff's rights thereunder."

3. By striking out clause (*c*) of said paragraph numbered 14, and inserting in lieu thereof the following:

"(*c.*) That said legislation, as construed and applied as aforesaid, impaired and impairs the obligation of contracts belonging to said company and to its stockholders, in violation of section 10 of article 1 of the Constitution of the United States, and the plaintiff's rights thereunder."

4. By striking out clause (*d*) of said paragraph numbered 14, and inserting in lieu thereof the following:

"(*d.*) That by said legislation, as construed and applied as aforesaid, the State or Commonwealth of Massachusetts denied and denies

to plaintiff and its stockholders the equal protection of the laws in violation of article 14 of the amendments to the Constitution of the United States, and of plaintiff's rights thereunder."

5. By inserting in clause (*e*) of said paragraph numbered 14, after the word "construed," in the phrase "to wit, that said act of 1894, as construed," the words "as aforesaid."

Also in the same clause, by striking out the word "used," in the phrase "at the end of which period the corporeal property
74 would be worth somewhat less then when used," and substituting for said word "used" the word "new."

6. By adding to said paragraph numbered 14 the following clause:

(*f*.) That the effect of said act of 1894, and said act of 1893, as re-enacted by said act of 1894, under the circumstances alleged, and as construed by said supreme judicial court in said opinion, was to violate plaintiff's rights under the Constitution of the United States, and that said act of 1894, including said act of 1893 as re-enacted by said act of 1894, is unconstitutional (under the Constitution of the United States) and void.

7. By inserting in the "first" paragraph of the prayer, after the phrase, "general court of Massachusetts," the figures "1894."

8. By striking out from the "second" paragraph of the prayer the word "in," preceding the word "unconstitutional," and substituting the word "is."

9. By striking out the "eighth" prayer, and substituting therefor the following:

"*Eighth.* That the defendant be restrained from making, executing, negotiating and issuing any bonds, notes or scrip under the provisions of said act of 1894; and also from attempting in any way to enforce said award; also that defendant be restrained from extending, changing, parting with, encumbering, or wasting in any way, the system, or plant and property described in said deed, and from operating in any form upon the security of such property, and from paying out for any purpose but the purpose of operating said system and plant and making necessary repairs upon the same, any of the funds or revenue arising out of said system, plant and property."

NEWBURYPORT WATER COMPANY,
By its solicitor, LAURISTON L. SCAIFE.

LAURISTON L. SCAIFE, *Of Counsel*.

75 *Demurrer.*

Filed Sept. 27, 1897.

The respondent, The City of Newburyport, demurs to the complainant's bill in the above-entitled cause, and assigns as grounds of demurrer the following:

First. That the bill does not show that this court has jurisdiction

to entertain the same, or to administer any relief thereon; that it does not thereby appear that in law there has been any taking of the complainant's property, or any taking of property without just compensation, or without due process of law, or any impairment of the obligation of any contract, or any denial of the equal protection of the laws, or any other violation or invasion of any Federal right of the complainant, or that the case thereby stated is in law a case arising under the Constitution or laws of the United States.

Second. That the bill does not set forth or show any right to or ground of relief in equity against the complainant; and that it appears by the bill that the complainant thereby seeks to undo and reverse in a court of equity what has been properly done within its jurisdiction by a court of law.

Third. That it appears by the bill that the complainant thereby seeks to re-examine and re-try in this court a case brought by itself against this respondent, and already tried and determined in the supreme judicial court of Massachusetts, within its jurisdiction, in which case the subject-matter of this bill has been duly tried and determined between the parties hereto; and to revise, reverse and set aside the proceedings of said court, in and by this proceeding.

Fourth. That it appears by the bill that the complainant transferred its property to the respondent under circumstances and upon terms which in law constituted a contract between the parties hereto, and that all the provisions of said Massachusetts statute of 1894 entered into and became and were terms of the contract, upon which the respondent, in voting to purchase the complainant's property as alleged, and otherwise, had and still has a right to rely, and must be presumed to have relied; and that such contract, or the pro-
76 ceedings thereunder, cannot be rescinded, impaired, or otherwise affected, in or by means of this proceeding.

Fifth. That it appears by the bill that all acts of the respondent and all proceedings in the courts of Massachusetts, and all the consequences thereof, complained of and set out in the bill as grounds of jurisdiction or of relief in this court, in law proceeded solely from the voluntary acts of the complainant in offering for sale and selling its property to the respondent, and proceeding in the courts of Massachusetts for ascertainment of the value thereof, under the Massachusetts statute of 1894 as set out in the bill; and that such proceedings or consequences are not a lawful ground of complaint or objection on the part of the complainant, and that the complainant cannot in law disturb or question the same in or by this proceeding.

Sixth. That it appears by the bill that each and every Federal question thereby sought to be raised, or relied on as a ground of jurisdiction in this court, might have been raised by the complainant in the proceedings in the State court of Massachusetts set out in the bill, and properly reviewed by the judiciary of the United States in such proceedings, or might have been raised in this court, if at all, before trial of its case in the State court; and that by omitting then or there to raise any such question, and by its laches in the

premises, the complainant is debarred and estopped from maintaining the present bill.

Seventh. That it appears by the bill that a previous suit involving the same subject-matter is pending between the same parties in the supreme judicial court of Massachusetts having jurisdiction thereof, which suit, or the further proceedings therein, cannot in law be stayed or interfered with by means of this proceeding, which in law cannot be maintained pending said suit in the State court.

Wherefore, and for other good causes of demurrer appearing therein, the respondent demurs to the complainant's bill, and prays the judgment of the court whether it ought to be held to make further answer thereto.

A. E. PILLSBURY,
C. C. DAME,
Solicitors and of Counsel for the Respondent.

77 & 78 We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

A. E. PILLSBURY.
C. C. DAME.

UNITED STATES OF AMERICA, }
District of Massachusetts. }

NEWBURYPORT, *Sept.* 25, 1897.

I, Andrew R. Curtis, mayor of the city of Newburyport, on oath depose and say in behalf of the respondent that the foregoing demurrer of said city to the bill of complaint in the above-entitled cause is not interposed for delay.

ANDREW R. CURTIS.

Subscribed and sworn to by the said Andrew R. Curtis before me,
[SEAL] DAVID P. PAGE,
Notary Public.

February 24, 1898.

COLT, *J.:*

Demurrer overruled.

Attest: A. H. TROWBRIDGE, *Clerk.*

79 *Answer.*

(Filed April 14, 1898.)

The City of Newburyport, defendant in said cause, not waiving any rights under its demurrer heretofore filed to the plaintiff's bill, but reserving and insisting upon its rights thereunder, and under its appeal from the decision of the court thereon, so far as it may now or hereafter lawfully do, and without admitting the jurisdiction of the

court, makes answer to the bill, or to so much thereof as ought in law to be answered, as follows:

1. The defendant admits the averments set out in paragraph 1 of the plaintiff's bill.

2. It admits the averments set out in paragraph 2 of the bill.

3. The defendant is advised and alleges that all the averments set out in paragraph 3 of the bill, with the Exhibits B and C thereto annexed, are in law impertinent and ought not to have been inserted in the bill and ought to be expunged therefrom; and that the defendant is not required to make any further answer thereto.

4. The defendant is advised and avers that the averment of paragraph 4 that the act of 1880 therein referred to was obtained by the incorporators with the co-operation, assent and assistance of the defendant is in law impertinent and ought not to have been inserted in the bill and ought to be expunged therefrom; and that the defendant is not required to further answer the same. It admits the establishment of a water system, and the making of the contract annexed to the bill as Exhibit D, but denies that said contract gave the plaintiff company any exclusive right to furnish water to the defendant city or its inhabitants for the term of twenty years, or for any period of years, or under any conditions whatever. It admits that no vote was ever taken by the defendant city under section 11 of chapter 235 of the Acts of 1880 upon the question of purchase of the property of the plaintiff thereunder.

5. The defendant admits the averments of paragraph 5 of the bill, but avers that upon the delivery of the deed of Jan. 29, 1895, from the plaintiff company to the defendant city therein referred to, said contract was terminated by the voluntary act of the plaintiff;
80 or that the plaintiff was thereby disabled from further performing said contract; or that the contract was waived, or merged in and adeemed by the sale effected by said deed; and that it formed no part of the subject of the transfer or sale effected by the deed, and was not a subject of any claim or compensation thereunder.

6. The defendant is advised and avers that all the averments of paragraph 6 of the bill, except those relating to sections 3, 41 and 42 of chapter 105 of the Public Statutes of Massachusetts, which it admits, are in law impertinent and ought not to have been inserted in the bill and ought to be expunged therefrom; and further, that they are averments of conclusions of law and not of facts, which the defendant is not required to answer.

And without waiving this objection, but insisting thereon, the defendant denies each of said averments, and especially denies that any exclusive right to supply water in the defendant city, or any exclusive right of eminent domain, vested in the plaintiff company under said contract, or that the defendant thereby contracted not to compete with the plaintiff in furnishing water to itself or its inhabitants, or not to apply to the general court for legislation authorizing the same during the twenty years from Oct. 1, 1881, or at any time,

or that the defendant thereby became estopped to deny that the plaintiff had such exclusive rights.

7. The defendant is advised and avers that all the averments of paragraph 7 of the bill, except that the legislature of Massachusetts enacted chapter 471 of the Acts of the Year 1893, annexed to the bill as Exhibit E, which it admits, are in law impertinent and ought not to have been inserted in the bill and ought to be expunged therefrom; and that the defendant is not required to answer the same.

And without waiving this objection, but insisting thereon, the defendant denies that it ever petitioned the general court for an act to authorize it to compete with the plaintiff company in furnishing water without buying the plant of the plaintiff company; and denies that any such petition presented by it was in contravention of any vested rights of the plaintiff company as alleged, or in contravention of any policy ever existing in said Commonwealth not to authorize any city or town to compete in furnishing water, gas or electric light, with any private corporation engaged with its consent
81 in furnishing the same therein; and it denies that the plaintiff company ever had any vested rights under said act of 1880, or any exclusive right to supply water in the defendant city under said contract of Aug. 17, 1880, or otherwise; and denies that there is or ever was any such policy established or existing in said Commonwealth as averred in said paragraph.

And further answering the averments of said paragraph, if said averments, or the proceedings of the Massachusetts legislature, or the conduct or proceedings of the parties, prior to the passage of the act of 1893, are material or relevant to this suit, the defendant says that during the latter part of the year 1892 and the early part of the year 1893, prior to the hearing before the legislative committee upon the defendant's petition referred to in said paragraph, it was discovered that the plaintiff company, in violation of law and of its duty to the inhabitants of the defendant city under its charter and contract, and of its obligation to furnish pure and wholesome water to the inhabitants of the city, was surreptitiously pumping into its water supply, and delivering to the inhabitants of said city for drinking and for all other domestic purposes, the waters of the Merrimac river, upon the bank of which its works were situated, which waters, at the point where they were taken from the river and introduced into the water supply of the plaintiff company, were charged with the sewage of the cities of Lowell, Lawrence and Haverhill, and of several towns, of an aggregate population amounting to about two hundred thousand people; that in consequence of the introduction by the plaintiff company of this corrupted water into its water supply furnished and delivered to the inhabitants of the defendant city, an epidemic of typhoid fever and of winter cholera broke out in said city during the winter of 1892 and 1893, which led to investigation of the conduct of the company and to discovery by the inhabitants of the city of its secret introduction of the water of the Merrimac river into its water supply; that the inhabitants of the defendant city there-

upon became greatly alarmed, and went to the legislature for relief by their petition referred to in said paragraph 7, and that the facts above set forth were admitted by the plaintiff company, or were otherwise proved before the legislature, and that this conduct of the plaintiff company was the principal cause which moved the
82 inhabitants of the defendant city to seek such relief, or to seek any legislation on the subject, and in part moved the legislature to the passage of the act of 1893, being Exhibit E annexed to the bill.

8. The defendant admits the averments of paragraph 8 of the bill relating to the vote of its inhabitants upon the purchase of the property of the plaintiff under the act of 1893, and upon the acceptance of said act. The defendant denies that thereupon, or at any time, it threatened to establish a system of water supply for the defendant city or its inhabitants, or to compete with and ruin the plaintiff, and avers that it never took any further formal or official action under said act of 1893 after the votes set out in said paragraph, or any action thereunder, except to make some examination of another source of water supply.

The defendant is advised and avers that all the further averments of said paragraph 8 not hereinbefore answered, with Exhibits F and G annexed thereto, except that the legislature of Massachusetts duly passed chapter 474 of the Acts of the Year 1894, annexed to the bill as Exhibit H, which it admits, are in law impertinent and ought not to have been inserted in the bill and ought to be expunged therefrom; and that the defendant is not required to answer the same.

And without waiving this objection, but insisting thereon, the defendant, if required to make any further answer to said paragraph 8, denies that during the pendency of the plaintiff's petition therein referred to, the defendant city, by its mayor, counsel or otherwise, threatened to compete with the plaintiff company in supplying water to itself and its inhabitants, or to ruin the plaintiff by such competition; and it denies that the act of 1894, annexed to the bill as Exhibit H, was passed by the legislature without the assent or against the contention of the plaintiff, and says that said act was passed at the sole intervention and solicitation of the plaintiff, to avoid and nullify the act of 1893, and prevent the city from supplying itself with water thereunder, and against the opposition of the defendant; and that the plaintiff was earnestly desirous of obtaining such act, and immediately upon the passage thereof accepted the same, and took full advantage thereof for its own benefit, as in the plaintiff's bill fully appears.

83 9. The defendant admits that chapter 474 of the Acts of 1894 was as quoted in said paragraph 9, so far as quoted therein. It is informed and believes, and therefore admits, that a notice was issued for a meeting of the stockholders of the plaintiff company, as therein set forth, and that such meeting was held and that a vote was there passed to sell to the defendant the property of the plaintiff company, as therein set forth, and that notice thereof

was given the defendant; and it believes Exhibit I to be a copy of such notice.

The defendant is advised and avers that the averments of said paragraph relating to the number of shares of stock in the plaintiff company, the number of shares represented at said meeting, and that some of the absent stockholders received no notice thereof, are in law impertinent and ought not to have been inserted therein and ought to be expunged therefrom; and that the defendant is not required to answer the same.

The defendant further denies that the question submitted to vote of the inhabitants of the defendant city, under the act of 1894, on or about Jan. 15, 1895, is correctly set forth in said paragraph 9, and avers that said question as submitted to the inhabitants of the defendant city also contained, following the terms thereof as quoted in said paragraph 9 of the bill, the further words: "in accordance with the provisions of section 1 of chapter 474 of the Acts of the Year 1894," so that the question submitted and voted upon was whether the defendant city should purchase the rights, privileges, easements, etc., of the plaintiff company, "in accordance with the provisions of said section 1 of chapter 474 of the Acts of 1894;" that the defendant city never contemplated or undertook the purchase of any property of the plaintiff company, except under and in accordance with the terms of said vote as thus set forth, and under and in accordance with the terms of said section 1 of the act of 1894; and that the terms of said act and said vote constituted a contract, and the only contract, of purchase and sale of said property by the plaintiff company to the defendant city; and that the defendant city never purchased or took, and cannot be held to have purchased or taken, said property, or any part thereof, upon any terms except the terms of said contract. It admits that upon that question the vote of
84 its inhabitants was as set out in said paragraph. It admits that on or about Jan. 29, 1895, the plaintiff company executed and delivered to the defendant city the written deed, a copy of which is annexed to the bill as Exhibit J. It denies that by said deed, or otherwise, the plaintiff company had any power to enlarge, vary, or in anywise affect the terms or effect of the act of 1894, under authority of which it was made; and denies that the plaintiff had any legal right or authority to insert in said deed the words contained in paragraph 26 thereof: "all the rights, privileges and easements heretofore acquired under chapter 235 of the Acts of the Legislature of Massachusetts for the Year 1880, and now used by said company, of laying and maintaining water pipes and mains in said streets, and of making connections therewith for the purpose of supplying said city and the inhabitants thereof with water," or the words, "and all the rights and franchises of said company, whether for supplying water to the city of Newburyport and the inhabitants thereof, and of collecting water rates therefor, or otherwise;" or any right or authority to set forth in said deed, as part of the property conveyed thereby, the water-supply contract between the plaintiff and the defendant, dated Aug. 17, 1880; and it denies that the

insertion of said words in said deed were of any legal force or effect whatever to bind the defendant or otherwise; and denies that said contract or said franchise rights of the company therein so described formed any part of the property which the plaintiff was authorized to convey to the defendant, or which the defendant was required to purchase of the plaintiff under the act of 1894; and denies that they or any of them did pass to the defendant, or that the plaintiff thereby parted with, or that the defendant thereby acquired, the same or either thereof; and the defendant avers that the insertion of all said words in said deed was an unauthorized and unlawful attempt of the plaintiff to obtain compensation for its franchise rights and water contract, which it was not authorized to convey to the defendant, and which the defendant was not required to purchase and did not purchase of the plaintiff, and that such attempt was of no legal force or effect whatever.

The defendant denies that it ever accepted said deed or conveyance, except on the terms of the contract of purchase as defined and prescribed by the act of 1894; that it duly notified the plain-
85 tiff thereof by the vote, a copy of which is annexed to the bill as Exhibit K, which was duly communicated to the plaintiff; that such vote was not a vote of the board of aldermen, but was a vote of the city council of the defendant city duly approved; and that under the act of 1894, the plaintiff's deed, and the vote of the city and the notice thereof, the defendant city did not purchase any franchise rights of the plaintiff, nor the plaintiff's contract with the city, of Aug. 17, 1880, and the plaintiff did not convey the same or any part thereof, and it was not and is not entitled to be paid anything on account thereof.

The defendant avers that the said acts of 1893 and 1894 were in all respects a proper and valid exercise of the legislative power of Massachusetts; that they invaded no rights of the plaintiff; that the plaintiff was in all respects fully bound thereby; and that thereunder it had no right, power or authority to convey to the defendant city, and the defendant city was not thereby required to purchase, and never has purchased, any franchise rights of the plaintiff, or its right to lay water pipes in the streets of Newburyport, or the contract of Aug. 17, 1880; and that if any franchise rights of the plaintiff have passed to the defendant, they passed from the legislature directly, by virtue of said act of 1894, and not from the plaintiff, and are not a subject of compensation to the plaintiff.

The defendant admits that upon receiving said deed from said company, upon the terms of said vote and notice, it took possession of all the property described therein which was ever delivered to it, but not of said contract or of any franchise rights of the plaintiff; and that it still retains possession of the property so delivered, and collects revenue therefrom, and avers that it holds all said property in its own right, by a good and valid title, under and according to said conveyance and the act of 1894, under which it was made.

10. The defendant denies that the action of the plaintiff company detailed in paragraph 9 of the bill, and resulting in said conveyance

of Jan. 29, 1895, was voluntary in name and form only and was in fact compulsory, or that said offer of sale and deed were made by the plaintiff to the defendant under threat of municipal competition or to avoid ruin, or that said acts by which the defendant came into possession of the property described in said deed constituted a taking of such property; and the defendant avers that all of said proceedings of the plaintiff were in law and in fact voluntary; that the plaintiff itself sought and procured the statute under which said proceedings were taken; that it desired and welcomed the opportunity of selling its property to the city upon the terms of said statute; that the said action of the plaintiff corporation must be deemed in law voluntary, irrespective of the state of mind or the motives of any of its stockholders; and that no complaint or objection was ever raised by the plaintiff against said act of 1894 or the terms thereof until it had voluntarily and deliberately conveyed its property thereunder, proceeded for damages in the supreme judicial court of Massachusetts, and was dissatisfied with the amount of damages awarded; and that the claim and pretence of the plaintiff that its proceedings under the act of 1894 were compulsory, or that the act of 1894 or the act of 1893 is unconstitutional or in violation of any rights of the plaintiff, is a mere afterthought devised for the sole purpose of avoiding the unsatisfactory award of damages in the State court, and of obtaining, if possible, a new trial of its case in this court; and the defendant further avers that no proceedings of the parties set out in the bill, under the act of 1894, can in law be taken or held to be a taking of any property of the plaintiff, but that the same constituted a valid purchase thereof by the defendant, under and according to the terms of the act of 1894.

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11. The defendant admits the averments of paragraph 11 of the bill, except that it denies that the commissioners appointed by the supreme judicial court excluded from their valuation or from the amount of their award any property of the plaintiff, or any element of value thereof, which was conveyed by said deed, or for which the plaintiff was entitled to any compensation; and avers that said commissioners properly valued all the property of the plaintiff which passed by said conveyance, or for which the plaintiff was entitled to any compensation; and further, that they added to the amount of the valuation thereof, as fully appears by the bill and by their report as set out therein, the sum of forty thousand dollars ($40,000), in view of the fact that the plaintiff's property was a going concern and in full operation, no part of which the commissioners were required by law to add to or include in their award; and the plaintiff had no legal right to recover the same, or any part thereof; and that the award of the commissioners as set out in the bill should have been the sum of $235,000, which sum was found by the commissioners to be the value of the tangible property conveyed by the plaintiff, instead of the sum of $275,000.

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The defendant further says that the bill does not set forth a full

and exact copy of the commissioners' report and award, and craves leave to produce the same if material; and especially that it does not appear by the parts thereof set forth in the bill, that the commissioners did not find that the plaintiff company ever paid anything for its rights to lay water pipes in the defendant city.

12. The defendant admits the averments of paragraph 12 of the bill as to the proceedings in the supreme judicial court of Massachusetts therein set forth, except as hereinafter set forth, and it avers that the plaintiff's petition to said court for rehearing, therein set forth, has, since the filing of said bill, been dismissed. The defendant denies that it is or was ever doubtful whether the plaintiff was precluded from contesting in said cause, in said supreme judicial court, the constitutionality of said act of 1894; and avers that the same could have been contested by the plaintiff had any attempt been seasonably made so to do; and that no such attempt was ever made until it was made by the petition for rehearing, filed after said cause had been fully tried and gone to final judgment by acceptance by said court of the award of the commissioners; that it was open to the plaintiff in said cause to contest to the full extent the constitutionality or validity of the valuation clause of the act of 1894, which is the only clause thereof now or ever complained of by the plaintiff; and the defendant avers that, as more fully set forth hereafter, the negligence and omission of the plaintiff to question the constitutionality or validity of said legislation seasonably in said cause or elsewhere was such laches as now to bar and defeat the right of the plaintiff to question the same or to maintain this bill.

The defendant is advised and avers that the statements of said paragraph 12, relating to the argument of the plaintiff before the supreme judicial court of Massachusetts, or as to whether any of its stockholders did not assent to the sale and conveyance, or were
88 not notified of the special meeting, or were not present thereat, or never assented to the offer, sale, conveyance or delivery of its property by the plaintiff to the defendant, are in law impertinent and ought not to have been inserted in said bill and ought to be expunged therefrom; and that the defendant is not required to further answer the same.

13. The defendant says that all the averments of paragraph 13 of the bill are conclusions of law, to which the defendant is not required to answer; but the defendant denies the same and each thereof, and avers that said act of 1894 was a valid exercise of the power of the legislature of Massachusetts, and that thereunder the plaintiff had no right to sell, and never did sell, to the defendant, and the defendant was not required to purchase, and never did purchase, of the plaintiff, any franchise rights whatever, or the contract of Aug. 17, 1880; and that the plaintiff had no right to claim, and the defendant was not required to make, any compensation for any such franchise rights or for said contract; and the defendant denies that the acceptance by it of the plaintiff's deed was an acceptance or taking of any property, except of so much of the property therein described as the plaintiff was by the act of 1894 authorized to sell

and the defendant required to purchase; and that said conveyance was expressly made "in consideration of the compensation provided by said act" of 1894, which act expressly excluded therefrom any enhancement thereof on account of the franchise rights of the plaintiff, or of its future earning capacity or good will.

14. The defendant says that all the averments of paragraph 14 of the bill, except the averments as to the net income of the plaintiff and the value of its franchise rights, are conclusions of law to which the defendant is not required to answer: but the defendant denies the same and each thereof, and especially denies that the effect of said act of 1894, or said act of 1893, in connection therewith or otherwise, was to take any property of the plaintiff without the consent of the plaintiff, or of its stockholders or each of them, and avers that the plaintiff company voluntarily consented to convey and conveyed its property to the defendant under and in accordance with said acts, and that the consent of its individual stockholders thereto is non-essential and immaterial; and the defendant denies that the effect of said acts, or the proceedings thereunder, was to enable the
89 defendant to take any property from the plaintiff without just compensation or otherwise; it denies that said legislation as construed deprived the plaintiff of any property without due process of law, or impaired the obligation of any contract belonging to said company or its stockholders, or denied to the plaintiff or its stockholders the equal protection of the laws, or involved any other violation of the constitution of Massachusetts or of the United States; and it denies that the act of 1894, as construed by the court or otherwise, intended to give or transfer, or had any effect to give or transfer, any incorporeal or other property of the plaintiff to the defendant without payment therefor; and the defendant avers that the plaintiff was never entitled to any payment by the defendant for its right to use the streets of the defendant city for laying pipes and distributing water therein; that such rights were in no degree acquired from or under the contract of Aug. 17, 1880, between the plaintiff and the defendant, but were part of its general franchise rights, acquired from the legislature by and under its charter; that all such rights were fully within the control of the legislature of Massachusetts at all times; that the act of 1894 did not provide for or contemplate any transfer of any such rights by the plaintiff to the defendant; and that the legislature of Massachusetts had full power to provide, as it did provide in said act, that such rights should not be transferred to the defendant, or the defendant required to take or pay for the same, and full power to provide, as it did provide, that the valuation and payment for the property, which was to be and was transferred by the plaintiff to the defendant, should be ascertained without enhancement on account of any franchise rights of the plaintiff; and that the defendant city acquired and holds its franchise rights to supply itself with water, and to collect rates therefor, by direct grant from the legislature in and by said act of 1893 or said act of 1894, and not in any part from the plaintiff company.

The defendant further avers that under the provisions of said act of 1894 the net income of the company was immaterial and inadmissible to be considered; that it had and could have no lawful bearing upon the valuation of the property transferred in accordance with the terms of said act; and it denies that the franchise rights of the plaintiff are or ever were worth the sum of
90 $475,000, and says that the valuation so put upon them by the plaintiff in the bill is absurd, and is reached by deducting the amount of the commissioners' award from the capitalized net income of the company, which capitalized net income furnishes no indication whatever of the true value of the plaintiff's franchise rights at any time; and the defendant avers that the sum of $40,000, which was added by the commissioners in their award to the property value of the plaintiff's plant, as found by them, as appears by the bill, was in effect compensation for its franchise rights, future earning capacity and good will, though no compensation therefor was required, and was fully equal to the value thereof.

15. The defendant admits that on or about July 12, 1897, it took steps to issue bonds for the purpose of paying the amount of the award to the plaintiff company, but says that in view of the bringing of this suit it has since taken no farther steps thereto.

16. As to the averments of paragraph 16 of the bill, it denies that this suit arises under the Constitution of the United States, and avers that neither the legislation of Massachusetts, referred to in the bill, nor any proceedings thereunder, were or can in law be held to amount to a taking of property without just compensation, or impairment of the obligation of any contract, or denial to the plaintiff of the equal protection of the laws, or other violation or invasion of any right of the plaintiff under the Constitution of the United States; and it denies that this court has any jurisdiction to entertain this bill on account thereof or otherwise.

17. The defendant further answering said bill, especially that part thereof which seeks or prays damages or compensation for the property conveyed by the plaintiff to the defendant, says that all the matters and things set forth in the bill, and especially the plaintiff's claim to compensation for said property, have been fully tried and determined in the suit between the same parties in the supreme judicial court of Massachusetts, referred to and described in the bill, which court had full jurisdiction thereof, which jurisdiction was voluntarily invoked by the plaintiff; and that said suit had gone to final judgment before the filing of this bill, which judgment conclusively determines the rights of the parties in respect of all the matters and things set forth in the bill; and that they cannot be further heard, tried or examined herein; that the plaintiff's bill is an attempt
91 to review and retry a case already fully tried and determined in a competent tribunal of the plaintiff's choice; and that the plaintiff resorts to this court only because it is dissatisfied with the result of such trial, and with the amount of the award therein; that no new or different facts from the facts so tried and determined in the supreme judicial court of Massachusetts are presented in the

present bill, or now exist; and that the present bill is only an attempt to give a different legal effect to the same facts, in order to avoid the result of the proceedings in the State court, in view of the plaintiff's dissatisfaction with the amount of the award therein; and that all the matters and things set forth in the plaintiff's bill are *res judicata*.

18. The defendant further says that if the Massachusetts act of 1893 was unconstitutional or invalid as alleged, it was open to the plaintiff to raise that question by proceedings in the State court, or by original bill in this court, if that question can now be raised here, either before or after the passage of the act of 1894, and in either method to obtain a final adjudication thereon by the Supreme Court of the United States, if necessary to its rights; and after the passage of the act of 1894 it was open to the plaintiff to raise all questions of the constitutionality or validity of either act by proceedings in the State court, or by original bill in this court, if this court now has any jurisdiction thereof; that the only complaint of the plaintiff against the act of 1894 is against the valuation clause in section 1 thereof; and that it was open to the plaintiff in its proceedings for compensation in the supreme judicial court of Massachusetts, as described in the bill, to raise all questions of the constitutionality or validity of said provisions for valuation, and to obtain a final adjudication thereon, if necessary, by the Supreme Court of the United States; that notwithstanding these facts, the plaintiff did not seasonably raise or attempt to raise, in or by any proceeding in either court, any question of the constitutionality or validity of any provision, either of the act of 1893 or of the act of 1894, but voluntarily accepted and took the full benefit of the act of 1894, according to its terms; offered its property to the defendant, for sale thereunder, by formal and deliberate vote of its stockholders; conveyed the same to the defendant by formal deed, by and
92 under authority of a vote of its stockholders, which deed was expressly made in consideration of the compensation provided by the act of 1894; proceeded in the State court under the terms of said act for ascertainment of such compensation, and fully tried in that court all questions bearing upon the same; all by a course of proceedings occupying a period of more than two years; and that the plaintiff throughout this period, or throughout the proceedings in the State court, neither raised nor suggested any question of the constitutionality or validity of the act of 1893 or the act of 1894; and that during said period, the defendant city, upon the faith of the plaintiff's acceptance of the act of 1894, and its deed and other proceedings thereunder, as hereinbefore and in said bill set forth, expended large sums of money, amounting to about fifty thousand dollars ($50,000), upon and in the necessary improvement of the property so conveyed by the plaintiff to the defendant, and other sums amounting to about fifty thousand dollars ($50,000) in its conduct of the proceedings brought by the plaintiff in the State court, and incurred other expenditures and obligations on the faith of the plaintiff's conduct and of said purchase; and the defendant

says that this conduct of the plaintiff, and its omission to raise any question of the validity of the act 1893 or the act of 1894, or of the validity of any proceedings thereunder, until the final termination of the proceedings in the State court by an award unsatisfactory to the plaintiff, and acceptance thereof by the full court, is laches whereby the plaintiff is barred from now questioning the validity of said legislation or proceedings, and from maintaining this bill.

19. The defendant further says that whether the Massachusetts act of 1894 was or was not satisfactory to the plaintiff, the plaintiff voluntarily accepted the same, and took the full benefit thereof, by offering its property for sale to the city thereunder, and by conveying the same to the city thereunder, and by proceeding under and according to said act for ascertainment of the price or value thereof, all as set out hereinbefore and in the plaintiff's bill; and that the plaintiff must be held in law to have voluntarily accepted said act of 1894 with all its consequences, and to have conclusively waived any objection thereto; and that the plaintiff is now estopped to deny
or question the constitutionality or validity of said act of 1893
93 or said act of 1894, or the validity of any of the proceedings
thereunder, in any particular, or to maintain this suit for that or for any other purpose.

20. The defendant further says that the plaintiff's deed of Jan. 29, 1895, by which it conveyed its property to the defendant, annexed to the bill as Exhibit J, was in fact and must in law be held to be voluntary and binding upon the plaintiff; that the same was not made under any legal duress or constraint, or under any circumstances which afford the plaintiff any right to avoid or question the same, or the full effect thereof, according to its terms; that said deed was expressly made in consideration of the compensation provided for such conveyance by said act of 1894, to be ascertained as therein provided; that by said deed the plaintiff is estopped to deny or question that the defendant now holds all the property thereby conveyed, which the plaintiff was by said act of 1894 authorized to convey to the defendant, or the defendant thereby required to purchase, by a good and valid title, and is estopped to claim that the compensation ascertained in accordance with said act of 1894, by the commissioners, and approved by the supreme judicial court of Massachusetts, as set out in the bill, is not full and lawful compensation for all the property conveyed by said deed, or which the plaintiff was by the act of 1894 or otherwise authorized to convey to the defendant or the defendant required to purchase of the plaintiff; and that by said deed the plaintiff is estopped to maintain this suit for any purpose.

21. The defendant further says, especially in answer to that part of the plaintiff's bill which seeks or prays ascertainment of compensation or damages due it for the property so conveyed to the defendant, that the proceedings of the parties under the Massachusetts act of 1894, as set out hereinbefore and in the plaintiff's bill, constituted a contract of purchase of the plaintiff's property, under and according to the terms of section 1 of said act, which terms became and

were the terms of said contract of purchase; that the defendant city voted to purchase said property on these terms and not otherwise; that if the defendant has not acquired the property on these terms it has not acquired it at all; that the defendant city cannot be held to have purchased or acquired any property of the plaintiff,
94 except under and according to the terms of such contract, as fixed and defined by said act, and for a price to be ascertained in accordance therewith; and cannot be held in this or any other proceeding to pay for said property any other price, compensation or damages, except as provided in said act and as ascertained in accordance with its terms; and that the plaintiff cannot have, in this or any other proceeding, any other or different ascertainment of the price or compensation to be paid for its property than that prescribed by the contract of purchase thereof, and awarded as set forth in the bill.

And the defendant claims the same benefit of the matters and things set out in the foregoing paragraphs, numbered 17 to 21, inclusive, as though the same and each of said paragraphs had been formally pleaded in bar of the plaintiff's bill.

22. The defendant further says that by and under the terms of section 3 of chapter 105 of the Public Statutes of Massachusetts, set out in the plaintiff's bill, being the reserved power over corporate franchises, the legislature of Massachusetts had full and absolute power to alter, amend or repeal the plaintiff's charter or franchise rights, or any part thereof, at its pleasure, without making or providing any compensation therefor; and that the provisions of said section 3 entered into, and in law formed a part and one of the terms of its charter, and an absolute condition upon which it held all of its franchise rights; that the plaintiff is a public service corporation, and that said legislature has inherent power of regulation and control over all such corporations; that said Massachusetts acts of 1893 and 1894 were respectively a proper and valid exercise of the power of the legislature of Massachusetts, and were in all respects fully binding upon the plaintiff; that said legislature had full power and authority to provide for a sale of the plaintiff's property as described in said act of 1894, for a price or compensation to be ascertained, without enhancement on account of any franchise rights of the plaintiff company, or its future earning capacity or good will, and had power to provide even for a taking or compulsory sale of said property without compensation for such rights; that all the proceedings of the parties, as set forth hereinbefore and in the plaintiff's bill, were valid and effectual in substance as they were in form, and all thereof are fully binding upon the plaintiff; that said proceedings
95 were not in fact, and cannot in law, be held to be, or to amount to, a taking or a compulsory sale of the property of the plaintiff or any part thereof, without just compensation or otherwise; and that in view of the powers of the legislature of Massachusetts, and of the proceedings of the parties under said legislation as aforesaid, the court has no jurisdiction to entertain the present bill or to administer any relief thereon, and the plaintiff has no right to

any relief in equity or otherwise, and the defendant ought not to be held to answer said bill, and the same ought to be dismissed.

23. The defendant further says, especially in answer to that part of the bill which seeks or prays reconveyance to the plaintiff of the property conveyed by it to the defendant as aforesaid, that upon the faith of the plaintiff's acceptance of the act of 1894, and its offer of sale, and its sale and conveyance of its property to the defendant thereunder, and of the proceedings of the plaintiff for ascertainment of the price thereof, under and according to the terms of said act of 1894, all as set forth hereinbefore and in the bill, it has expended large sums of money upon and in the necessary improvement of the property so conveyed to it by the plaintiff, amounting to about fifty thousand dollars ($50,000), by reason whereof said property has become and now is of much greater value than its value at the time of said conveyance, for all which expenditure and increased value the defendant is entitled to be allowed and compensated by the plaintiff in the event of reconveyance or restoration of said property to the plaintiff.

And the defendant denies each and every averment of the plaintiff's bill not hereinbefore admitted, denied or otherwise answered.

CITY OF NEWBURYPORT,
By GEORGE H. PLUMER, *Mayor.*

A. E. PILLSBURY,
C. C. DAME,
R. E. BURKE,
HORACE I. BARTLETT, *City Solicitor,*
Of Counsel.

DISTRICT OF MASSACHUSETTS:

BOSTON, *April* 13, 1898.

Personally appeared said George H. Plumer, and in behalf of the City of Newburyport made oath that the foregoing answer, by
96 him subscribed in behalf of said city, is true so far as it sets out the facts as of actual knowledge, and that it is otherwise true according to the best of his knowledge, information and belief.

Before me,
[SEAL.]

GRANT M. PALMER,
Notary Public.

Complainant's Exceptions to Defendant's Answer.

(Filed May 9, 1898.)

Plaintiff excepts to the answer of defendant herein filed, for impertinence in this:

Exception for impertinence.—For that the allegations in paragraph 7 of defendant's answer in the words following, to wit,

"And further answering the averments of said paragraph, if said averments, or the proceedings of the Massachusetts legislature, or the conduct or proceedings of the parties, prior to the passage of the act of 1893, are material or relevant to this suit, the defendant says that during the latter part of the year 1892 and the early part of the year 1893, prior to the hearing before the legislative committee upon the defendant's petition referred to in said paragraph, it was discovered that the plaintiff company, in violation of law and of its duty to the inhabitants of the defendant city under its charter and contract, and of its obligation to furnish pure and wholesome water to the inhabitants of the city, was surreptitiously pumping into its water supply, and delivering to the inhabitants of said city for drinking and for all other domestic purposes, the waters of the Merrimac river, upon the bank of which its works were situated, which waters, at the point where they were taken from the river and introduced into the water supply of the plaintiff company, were charged with the sewage of the cities of Lowell, Lawrence and Haverhill, and of several towns, of an aggregate population amounting to about two hundred thousand people; that in consequence of the introduction by the plaintiff company of this corrupted water into its water supply furnished and delivered to the inhabitants of the defendant city, an epidemic of typhoid fever and of winter cholera broke out in said city during the winter of 1892 and 1893, which led to investigation of the conduct of the company and to discovery by the inhabitants of the city of its secret introduction of the water of the Merrimac river into its water supply; that the inhabitants of the defendant city thereupon became greatly alarmed, and went to the legislature for relief by their petition referred to in said paragraph
7, and that the facts above set forth were admitted by the
97 plaintiff company, or were otherwise proved before the legislature; and that this misconduct of the plaintiff company was the principal cause which moved the inhabitants of the defendant city to seek such relief, or to seek any legislation on the subject, and in part moved the legislature to the passage of the act of 1893, being Exhibit E annexed to the bill,"

are impertinent and ought to be expunged.

A copy of said Exhibit E is hereto annexed and made part of this exception.

Plaintiff excepts to the answer of defendant herein filed, for insufficiency in this:

First exception for insufficiency.—For that the defendant hath not, to the best of its knowledge, remembrance, information and belief, answered the allegations contained in paragraph 3 of plaintiff's bill of complaint, which allegations are as follows:

"3. On information and belief, that in the year 1874, defendant, the said City of Newburyport, by a vote of its citizens, declined to ask for legislation authorizing a system of water supply for said city; that in 1878 (chapter 240) an act was passed by said general court which authorized the city to take a supply of water and to build a

plant for the distribution of water, which act required for its acceptance a two-thirds vote of the voters present and voting in said city of Newburyport. A vote was had thereon, resulting in the failure to accept said act.

A copy of said act of 1878, marked 'Exhibit B,' is hereto annexed and made part hereof.

That said act of 1878 (chapter 240) was continued in force by an act of the said general court, passed in 1879 (chapter 240), a copy of which last mentioned act, marked 'Exhibit C' is hereto annexed and made part hereof.

On information and belief that the incorporators of said act of 1880, prior to the passage of said act, petitioned said general court for the passage of such act, and, while such petition was pending the following order relating to said petition was adopted by said city:

'CITY OF NEWBURYPORT,
IN COMMON COUNCIL, *March* 8, 1880.

Ordered, the mayor and aldermen concurring, that his honor the mayor, for and in behalf of the city of Newburyport, be and is hereby authorized and instructed to sign in his official capacity the petition accompanying this order, and cause the seal of the city to be affixed thereto, and the city solicitor be and is hereby authorized and directed to present the same to the general court now in session, at his earliest convenience, and to use his best efforts to obtain
98 for the city an early and favorable consideration of the same by the legislature.'

That even after the passage of said act of 1880, it was, under sections 10 and 12 of said act of 1880, and said acts of 1878 and 1879, within the power of said City of Newburyport to establish a water system of its own; and, by voting so to do, and by carrying out the other provisions of section 12 of said act of 1880, to render inoperative said act of 1880, creating and establishing said Newburyport Water Company.

On information and belief, that said City of Newburyport did not accept said act of 1879, or otherwise comply with the provisions of said act of 1880, enabling it to establish a water system of its own; and that said acts of 1878 and 1879 became void, as provided in section 12 of said act of 1880."

Copies of said Exhibits B and C are hereto annexed and made part of this exception.

The defendant's allegations in its answer in respect to plaintiff's said allegations are set forth in paragraph 3 of defendant's answer as follows:

"The defendant is advised and alleges that all the averments set out in paragraph 3 of the bill, with the Exhibits B and C thereto annexed, are in law impertinent and ought not to have been inserted in the bill and ought to be expunged therefrom; and that the defendant is not required to make any further answer thereto."

Second exception for insufficiency.—For that the defendant hath not, to the best of its knowledge, remembrance, information and be-

lief, answered the following allegations in paragraph 8 of plaintiff's bill of complaint:

"That thereupon and thereafter" [*i. e.*, after the city had voted not to purchase under the act of 1893, and had voted to accept chapter 471 of the Acts of 1893] "it was claimed by the defendant that said chapter 471 of the Acts of 1893 was duly accepted and became effective, and that the defendant had the right thereunder to supply said city and its inhabitants with water and to receive revenue therefor;" ["that in this condition of affairs said city of Newburyport threatened thereupon to establish a system of water supply for said city of Newburyport and the inhabitants thereof, and to compete with and ruin plaintiff, The Newburyport Water Company, and that thereupon, plaintiff, The Newburyport Water Company,"—] (1) "fearing that said act of 1893 might be held to have been legally
99 accepted, and fearing that the property of said company would be damaged, ruined and destroyed by such threatened action of said city under said act of 1893,—presented to said general court, on or about the — day of ——, 1893, a petition praying for the passage of an act providing and requiring that said city should, before proceeding to supply water to itself or its inhabitants under said act of 1893, purchase the entire property of said company, or that, in some other suitable way, said company might be compensated for the damage resulting from the threatened competition by said city; that a copy of said petition, marked 'Exhibit F,' is hereto annexed and made part hereof; that with said petition said company presented a form of bill entitled 'An act to provide for the purchase of property of the Newburyport Water Company by the city of Newburyport,' a copy whereof, marked 'Exhibit G,' is hereto annexed and made part hereof; that said petition was referred to the committee on water supply; that said committee held hearings upon said petition, and that at such hearings both plaintiff and defendant herein were represented; that, during the pendency of said petition, said city, by its mayor, counsel and otherwise, threatened to compete with said water company in supplying water to said city and its inhabitants, and to ruin said company by such competition; that such competition would have greatly damaged said water company and would have ruined said company; that, as the result of the opposition and contentions made by said city to said general court or legislature of 1894, said company was unable to obtain the enactment of said bill or act, a copy whereof appeared annexed hereto as said Exhibit G; that without the assent, and against the contentions, of said water company before and to said general court or legislature, an act in lieu of said proposed act was passed by said general court or legislature, and constitutes chapter 474 of the Acts and Resolves passed by the general court of Massachusetts for the year 1894, a copy of which, marked 'Exhibit H,' is hereto annexed and made part hereof."

(1) What is quoted in brackets is answered, and is here inserted only as context to show the meaning and connection of the succeeding allegations.

Copies of said Exhibits F, G and H are hereto annexed and made part of this exception.

The defendant's allegations in its answer in respect to plaintiff's said allegations are set forth in paragraph 8 of defendant's answer as follows:

"The defendant is advised and avers that all the further averments of said paragraph 8 not hereinbefore answered, with Exhibits F and G annexed thereto, except that the legislature of Massachusetts duly passed chapter 474 of the Acts of the Year 1894, annexed to the bill as Exhibit H, which it admits, are in law impertinent and ought not to have been inserted in the bill and ought to be expunged therefrom; and that the defendant is not required to answer the same.

100 And without waiving this objection, but insisting thereon, the defendant, if required to make any further answer to said paragraph 8, denies that during the pendency of the plaintiff's petition therein referred to, the defendant city, by its mayor, counsel or otherwise, threatened to compete with the plaintiff company in supplying water to itself and its inhabitants, or to ruin the plaintiff by such competition, and it denies that the act of 1894, annexed to the bill as Exhibit H, was passed by the legislature without the assent or against the contention of the plaintiff, and says that said act was passed at the sole intervention and solicitation of the plaintiff to avoid and nullify the act of 1893 and prevent the city from supplying itself with water thereunder, and against the opposition of the defendant; and that the plaintiff was earnestly desirous of obtaining such act, and immediately upon the passage thereof accepted the same, and took full advantage thereof for its own benefit, as in the plaintiff's bill fully appears.

Third exception for insufficiency.—For that the defendant hath not, to the best of its knowledge, remembrance, information and belief, answered the following allegations in paragraph 12 of plaintiff's bill of complaint:

"That in such argument" (being the argument before the full court of the Commonwealth of Massachusetts upon the award of commissioners appointed under the petition of the Newburyport Water Company), "those who represented said company did not present or argue any claims or rights, under the Constitution of the United States, of said Newburyport Water Company, or of its stockholders generally, or of such of its stockholders as did not assent to the alleged sale and conveyance, or to the alleged offer in pursuance of which said sale and conveyance purport to have been made, and were not notified of the said special meeting of stockholders, and were not present, in person or by proxy, at said meeting, and have never assented to said alleged offer, sale or conveyance, or to any delivery thereunder of property of said Newburyport Water Company to the city of Newburyport;"

The defendant's allegations in its answer in respect to plaintiff's said allegations are set forth at the end of paragraph 12 of defendant's answer as follows:

"The defendant is advised and avers that the statements of said paragraph 12, relating to the argument of the plaintiff before the supreme judicial court of Massachusetts, or as to whether any of its stockholders did not assent to the sale and conveyance or were not notified of the special meeting, or were not present thereat, or never assented to the offer, sale, conveyance or delivery of its prop-
101 erty by the plaintiff to the defendant, are in law impertinent and ought not to have been inserted in said bill, and ought to be expunged therefrom, and that the defendant is not required to further answer the same."

In all *some or* of which particulars the said plaintiff is advised that the said answer of the defendant is evasive and insufficient, and ought to be amended, and humbly prays that the same may be amended accordingly.

L. L. SCAIFE,
Solicitor for Complainant.

ROBERT M. MORSE,
L. L. SCAIFE,
Of Counsel for Complainant.

EXHIBIT B.

Acts and Resolves of Massachusetts, 1878.

Chapter 240.

An act to supply the city of Newburyport with water.

Be it enacted, etc., as follows:

SECT. 1. The City of Newburyport is hereby authorized to supply itself and its inhabitants with pure water to extinguish fires, generate steam, and for domestic and other uses, and may establish public fountains and hydrants, and regulate their use, and may discontinue the same, and may collect such rents as may be fixed for the use of such water.

SECT. 2. Said city for the purposes aforesaid may take and hold the water, or so much thereof as may be necessary, not exceeding one and a half million of gallons daily, of any springs, natural ponds or brooks within the limits of said city, or of Kimball's pond in the towns of Amesbury and Merrimac, or any of the effluents from said pond; and may convey said waters or any part thereof into and through said city, and said town of Amesbury and the town of Salisbury; and may also take and hold, by purchase or otherwise, all necessary lands for raising, holding, flowing, diverting, conducting and preserving such waters, and conveying the same to any and all parts of said city, and of said towns of Amesbury and Salisbury; and may erect thereon proper dams, reservoirs, buildings,
102 fixtures, and other structures, and make excavations and embankments, and procure and run machinery therefor; and

for such purposes may construct and lay down conduits, pipes and drains, in, under or over any lands, water courses, roads or railroads, and along any street, highway, or other way other than a railway, in such manner as not to unnecessarily obstruct the same; and for the purpose of constructing, laying down, maintaining and repairing such conduits, pipes and drains, and for all other purposes of this act, may dig up, raise and embank any such land, street, highway or other way, in such manner as to cause the least hindrance to travel thereon; and in general may do any other acts and things necessary or convenient and proper for carrying out the purposes of this act. In case either of the towns in which said Kimball's pond is situated should hereafter apply for authority to take water from the same, the powers hereby granted shall not be construed as creating any priority of right, or operate to the prejudice of such application.

SECT. 3. Said City of Newburyport may, by vote of its city council, declare the quantity of water proposed to be taken under this act, not exceeding one and a half million of gallons daily, such vote to be passed not less than six months before the waters shall be withdrawn from said springs, ponds or brooks; and within sixty days from the time it shall take any lands, springs, ponds, brooks or water for the purposes of this act, otherwise than by purchase, said city shall file in the registry of deeds for the southern district of the county of Essex a description of such lands, springs, ponds, brooks or water, sufficiently accurate for identification, with a statement for the purposes for which the same are taken, together with a copy of such vote, if any has been passed, signed by the mayor of said city; and upon such filing, the terms of such vote shall be the measure and limit of the right of said city to take and divert the waters of such springs, ponds or brooks; but if no such vote is so passed and filed said measure and limit shall be one and a half million of gallons daily. If at any time said city shall take a larger quantity of water than said limit, it may be restrained by injunction from taking such larger quantity, in a suit in equity brought by any party interested.

SECT. 4. Said City of Newburyport shall be liable to pay all
103 damages that shall be sustained by any person or persons in their property by the taking of said waters or any part thereof as authorized by this act, or by the taking of any land, rights of way, water rights or easements, or by the erection of any dams, or the construction of any aqueducts, reservoirs, water ways or other works for the purposes of this act; and if the owner or owners of any property which shall be taken as aforesaid, or other person or persons sustaining damages as aforesaid, shall not agree on the damages to be paid therefor, he or they may apply by petition for an assessment of the damages at any time within three years from the taking of said property, or the construction of dams or other works occasioning damages as aforesaid, and not afterwards, to the superior court in the county in which the same are situated. Such petition may be filed in the clerk's office of said court, in vacation or in term

time, and the clerk shall thereupon issue a summons to the said City of Newburyport, returnable, if issued in vacation, at the next term of the said court to be held after the expiration of fourteen days from the filing of said petition, and if in term time, returnable on such day as said court shall order, to appear and answer to the said petition; the said summons shall be served fourteen days at least before the term or day at which it is returnable, by leaving a copy thereof and of the said petition, certified by the officer who shall serve the same, with the clerk of said city; and the said court may, upon default or hearing of said city, appoint three disinterested persons, who shall, after reasonable notice to the parties, assess the damages, if any, which such petitioner may have sustained as aforesaid; and the award of the said persons so appointed, or a major part of them, being returned into and accepted by the said court, shall be final, and judgment shall be rendered and execution issued thereon for the prevailing party, with costs, unless one of said parties shall claim a trial by jury as hereinafter provided.

SECT. 5. If either of the parties mentioned in section 4 shall be dissatisfied with the amount of damage awarded as therein expressed, such party may, at the term at which such award was accepted, or the next term thereafter, claim in writing a trial in said court, and have a jury to hear and determine at the bar of said court all questions of fact relating to such damages, and to assess the
104 amount thereof; and the verdict of said jury, being accepted and recorded by the said court, shall be final and conclusive, and judgment shall be rendered and execution issued thereon, and costs shall be recovered by the said parties respectively in the same manner as is provided by law in regard to proceedings relating to the laying out of highways.

SECT. 6. If said city takes the water from Kimball's pond or any of its effluents, it shall lay its aqueduct or main pipe, for conducting the same to said city, by some convenient route through the town of Amesbury. The inhabitants of any town upon the line of the works authorized by this act, upon the application of its board of selectmen, shall be entitled to the reasonable use of the water, for the same uses as are hereinbefore provided, upon paying an equitable compensation therefor, which in case of difference shall be determined by three commissioners, to be appointed by the supreme judicial court upon application of either party, and notice to the other, whose award, when accepted by said court, shall be binding upon the parties for the term of five years.

SECT. 7. Any town under whose roads, streets or ways said city lays its aqueduct or main pipe, may require said city to insert therein proper hydrants, at points not less than five hundred feet apart, to be used for the purpose of extinguishing fires, and for no other purpose. The expense of inserting said hydrants and keeping the same in repair shall be paid by such town.

SECT. 8. No application shall be made to the court for the assessment of damages for the taking of any water rights, or for any injury

thereto, until the water is actually withdrawn or diverted by said city under the authority of this act.

SECT. 9. If any person shall use any water taken under this act without the consent of said city, or shall wantonly or maliciously divert the water, or any part thereof, taken or held by said city pursuant to the provisions of this act, or corrupt the same, or render it impure, or destroy or injure any dam, aqueduct, pipe, conduit, hydrant, machinery or other works or property held, owned or used by said City of Newburyport under the authority of and for the purposes of this act, he shall forfeit and pay to said city three times the amount of damage assessed therefor, to be recovered in an action of tort; and on conviction of either of the wanton or malicious acts aforesaid, may be also punished by fine not exceeding three hundred dollars, or by imprisonment in jail not exceeding one year.

SECT. 10. For the purpose of paying all necessary expenses and liabilities incurred under the provisions of this act, said city shall have authority to issue coupon bonds to be denominated "Newburyport water bonds," to be signed by the treasurer of said city, to an amount not exceeding two hundred and fifty thousand dollars, payable at periods not exceeding thirty years from the date thereof, with interest payable semi-annually at a rate not exceeding six per centum per annum; and said city may sell said bonds at public or private sale, or pledge the same for money borrowed for the purposes of this act, upon such terms and conditions as it may deem proper. And the city council of said city is hereby authorized from time to time to appropriate, grant and assess such sum or sums of money as shall be deemed expedient, towards paying said expenses, or the principal of the money so borrowed or obtained, and the interest thereof, in the same manner as money is appropriated, granted and assessed for other city purposes.

SECT. 11. The rights, powers and authority granted to the city of Newburyport by this act shall be vested in and exercised by a board of water commissioners, consisting of three citizens of said city, who shall be chosen by the city council, by joint ballot of both branches. The said commissioners shall, during their continuance in office, execute, superintend and direct the performance of all the works, matters and things mentioned in the preceding sections which are not otherwise specifically provided for in this act; and shall be subject to such ordinances, rules and regulations, in the execution of their said trust, as the city council may from time to time ordain and establish, not inconsistent with the provisions of law. They shall serve for the period of three years from the time of their appointment, unless the construction of the works herein contemplated shall be sooner finished. Thereafter the rights, powers and authority granted to the said city by this act shall be vested in and exercised by a board of water commissioners, consisting of three citizens of said city, who shall be chosen by the city council, by joint ballot of both branches, one for the term of one year from the first Monday of January in the year eighteen hundred and eighty-one, one for the term of two years, one for the term of three years,

and annually thereafter one water commissioner shall be chosen to serve for the term of three years. Said commissioners shall receive such compensation as the city council of said city may prescribe, and a majority of said commissioners shall be a quorum for the exercise of the powers and duties prescribed by this act.

SECT. 12. The said water commissioners shall establish such prices or rents for the use of water as to provide annually, if practicable, from the net income and receipts therefor, for the payment of the interest on said water bonds, and also, after three years from the introduction of the water into said city, for the further payment of not less than one per centum of the principal of said bonds. The net surplus income and receipts, after deducting all expenses, interest and charges of distribution, shall be set apart as a sinking fund, and applied solely to the payment of the principal of said bonds, until the same are fully paid and discharged. The "commissioners of sinking fund," as now established by ordinance of said city, shall be trustees of said fund, and shall annually, and as often as the city council may require, render an account of all their doings in relation thereto.

SECT. 13. The occupant of any tenement shall be liable for the payment of the rent for the use of the water in such tenement; and the owner thereof shall be also liable if, on being notified of such use, he does not object thereto.

SECT. 14. This act shall take effect upon its passage, and shall become void unless accepted by a vote of two thirds of the legal voters of the city of Newburyport, present and voting thereon, at a legal meeting which shall be called in their several ward rooms for that purpose, by the mayor and aldermen of said city, within one year from the passage of this act, at which meeting the check list shall be used.

Approved May 11, 1878.

107 EXHIBIT C.

Acts and Resolves of Massachusetts, 1879.

Chapter 240.

An act to revive "An act to supply the city of Newburyport with water."

Be it enacted, etc., as follows:

Chapter two hundred and forty of the Acts of the Year Eighteen hundred and seventy-eight, being "An act to supply the city of Newburyport with water," is hereby revived and continued for two years from the passage of this act.

Approved April 18, 1879.

Exhibit E.

Acts and Resolves Passed by the General Court of Massachusetts in the Year 1893.

Chapter 471.

An act to supply the city of Newburyport with water.

Be it enacted, etc., as follows:

Sect. 1. The City of Newburyport may supply itself and its inhabitants with water for the extinguishment of fires and for domestic, manufacturing and other purposes, and may establish fountains and hydrants, relocate or discontinue the same; may regulate the use of such water and fix and collect rates to be paid for the use of the same.

Sect. 2. The said city, for the purposes aforesaid, may take, by purchase or otherwise, and hold the waters of any pond, stream, spring or wells within the limits of said city not heretofore taken or purchased by the Newburyport Water Company, and the Artichoke river in West Newbury and Newburyport, and the water rights connected therewith; and obtain and take water by means of bored, driven, artesian or other wells on any land within said city, and hold and convey said water through said city and through said town of West Newbury from said ponds and said river; and may also take and hold, by purchase or otherwise, all lands, rights of way and easements necessary for holding and preserving such water
108 and for conveying the same to any part of said city of Newburyport; and may erect on the land thus taken or held proper dams, buildings, fixtures and other structures; and may make excavations, procure and operate machinery and provide such other means and appliances as may be necessary for the establishing and maintenance of complete and effective water works; and may construct and lay down conduits, pipes and other works, under or over any lands, water courses, railroads or public or private ways, and along any such way in such manner as not unnecessarily to obstruct the same; and for the purpose of constructing, maintaining and repairing such conduits, pipes and other works, and for all proper purposes of this act, said city may dig up any such lands, and, under the direction of the board of selectmen of the town in which any such ways are situated, may enter upon and dig up any such ways in such manner as to cause the least hindrance to public travel thereon.

Sect. 3. The city shall, within sixty days after the taking of any lands, rights of way, water rights, water sources, or easements as aforesaid, otherwise than by purchase, file and cause to be recorded in the registry of deeds, for the county within which the same are situated, a description thereof sufficiently accurate for identification,

with a statement of the purpose for which the same were taken, signed by the water commissioners hereinafter provided for.

SECT. 4. The city shall pay all damages sustained by any person or corporation in property by the taking of any land, right of way, water, water source, water right or easement, or by any other thing done by said city under the authority of this act. Any person or corporation sustaining damages as aforesaid under this act, who fails to agree with said city as to the amount of damages sustained, may have the damages assessed and determined in the manner provided by law when land is taken for the laying out of highways, on application at any time within the period of three years from the taking of such land or other property, or in the doing of other injury, under the authority of this act, but no such application shall be made after the expiration of said three years. No application for assessment of damages shall be made for the taking of any water, water right, or for any injury thereto, until the water is actually withdrawn or diverted by said city under the authority of this act.

109 SECT. 5. The said city may, for the purpose of paying the necessary expenses and liabilities incurred under the provisions of this act, issue from time to time bonds, notes or scrip to an amount not exceeding in the aggregate four hundred thousand dollars; such bonds, notes or scrip shall bear on their face the words "Newburyport water loan," shall be payable at the expiration of periods not exceeding thirty years from the date of issue, shall bear interest payable semi-annually at a rate not exceeding six per centum per annum, and shall be signed by the treasurer of the city and be countersigned by the water commissioners hereinafter provided for. The said city may sell such securities at public or private sale, or pledge the same for money borrowed for the purposes of this act, upon such terms and conditions as it may deem proper, *provided*, that such securities shall not be sold for less than par value thereof. The city shall provide, at the time of contracting said loan, for the establishment of a sinking fund, and shall annually contribute to such fund a sum sufficient with the accumulations thereof to pay the principal of said loan at maturity. The said sinking fund shall remain inviolate and pledged to the payment of said loan and shall be used for no other purpose.

SECT. 6. The said city, instead of establishing a sinking fund, may, at the time of authorizing said loan, provide for the payment thereof in such annual proportionate payments as will extinguish the same within the time prescribed in this act; and when such vote has been passed the amount required thereby shall, without further vote, be assessed by the assessors of said city in each year thereafter, until the debt incurred by said loan shall be extinguished in the same manner as other taxes are assessed, under the provisions of section 34 of chapter 11 of the Public Statutes.

SECT. 7. The return required by section 91 of chapter 11 of the Public Statutes shall state the amount of any sinking fund established under this act, and if none is established, whether action has been taken in accordance with the provisions of the preceding sec-

tion, and the amounts raised and applied thereunder for the current year.

SECT. 8. The said city shall raise annually by taxation a sum which, with the income derived from the water rates, will be
110 sufficient to pay the current annual expenses of operating its water works, and the interest as it accrues on the bonds, notes and scrip issued as aforesaid by said city, and to make such contributions to the sinking fund and payments on the principal as may be required under the provisions of this act.

SECT. 9. Whoever wilfully or wantonly corrupts, pollutes or diverts any of the waters taken or held under this act, or injures any structure, work or other property owned, held or used by said city under the authority and for the purpose of this act, shall forfeit and pay to said city three times the amount of damages assessed therefor, to be recovered in an action of tort; and upon conviction of either of the above wilful or wanton acts shall be punished by a fine not exceeding three hundred dollars, or by imprisonment not exceeding one year.

SECT. 10. The powers and duties granted to and imposed upon the City of Newburyport by this act shall be exercised by a board of water commissioners, consisting of five residents of the city, to be appointed by the mayor with the approval of the city council. Said commissioners shall be appointed and hold their office from the time of their appointment and approval, for the terms of one, two, three, four and five years, respectively, from the first Monday of May next following their appointment; and thereafter one commissioner shall be appointed each year for the term of five years from the first Monday of May. All such commissioners, except in a case of removal, shall hold office until their successors are appointed in their stead. Vacancies occurring during the term may be filled for the remainder of the term. No person shall be appointed commissioner who holds, at the time, any city office by popular election. Any commissioner, after due notice and hearing, may be removed at any time by a two-thirds vote of each branch of the city council, for any cause which shall be deemed sufficient, and shall be expressed in the vote of removal. The commissioners shall receive no compensation for their services unless the city council, by a two-thirds vote of each branch thereof, otherwise determine, and in such case the amount of compensation may be fixed by a like two-thirds vote.

SECT. 11. The water commissioners shall fix such prices or rents for the use of water as shall produce annually, as near as may
111 be, a net surplus equal to two per centum of the total amount of the bonds, notes and scrip issued under this act, after paying all current expenses of operating the water works and interest upon loans, and after the payment of all expenses for new construction not exceeding ten thousand dollars in any one year. The commissioners of sinking funds of the city of Newburyport shall be trustees of a sinking fund which shall be set apart for the payment and redemption of said water loan, and which shall remain inviolate and pledged to the payment of said loan and shall be used for no

other purpose. The net surplus aforesaid shall be paid into the sinking fund, and if said surplus does not equal two per centum of the total amount of the bonds, notes and scrip issued under this act, the city shall raise by general taxation a sum which with the surplus shall equal said two per centum, and shall contribute said sum to the sinking fund. The commissioners shall annually, and as often as the city council may require, render an account of all their doings in relation to the sinking fund, and shall be governed by the provisions of section eleven of chapter twenty-nine of the Public Statutes, except as herein otherwise provided.

SECT. 12. At any time within sixty days after the passage of this act, and not after sixty, the Newburyport Water Company may notify the mayor of Newburyport in writing that it desires to sell to said city its corporate property and all the rights and privileges of said company, and execute and deliver to said city proper deeds and instruments in writing, conveying to said city the property aforesaid; *provided, however*, the legal voters of the city of Newburyport, at legal meetings to be called in the several wards of said city within six months after said notification has been received as aforesaid, shall, by a majority vote of the voters of said city present and voting thereon at such meetings, vote to purchase the aforesaid property upon the terms and conditions contained in this section, whereupon the property thus conveyed shall become the property of the city of Newburyport, and said city shall be liable to pay to said company the fair value of the property thus conveyed; and in case the said city and the said company shall be unable to agree upon the value of said property, the supreme judicial court may, upon application of either party and notice to the other, appoint three com-
112 missioners, one of whom shall be a skilled engineer, and one learned in the law, who shall determine the fair value of said property conveyed as aforesaid, and whose award, when accepted by the court, shall be final.

SECT. 13. After the vote provided for in section twelve of this act, or provided the Newburyport Water Company does not so notify the said mayor within said sixty days, this act shall be submitted to the legal voters of the city of Newburyport for their acceptance or rejection, at legal meetings to be called in the several wards of said city within eight months from the passage of this act, and shall take effect from and after its acceptance by a two-thirds vote of the voters of said city present and voting thereon at such meetings. The vote shall be by separate ballot, and the ballot shall be Yes or No, in answer to the question, "Shall the City of Newburyport accept chapter — of the Acts of Eighteen hundred and ninety-three, authorizing the City of Newburyport to establish and maintain a system of water supply for domestic and other uses?" This act shall be void if not accepted by said vote.

Approved June 10, 1893.

Exhibit F.

To the honorable senate and house of representatives of the Commonwealth of Massachusetts, in general court assembled:

The undersigned petitioner, The Newburyport Water Company, respectfully represents:

That it is a corporation duly established by virtue of the provisions of chapter 235 of the Acts of the Year 1880; that the City of Newburyport has voted to accept the provisions of chapter 471 of the Acts of the Year 1893, and, by virtue of the authority conferred upon it by said act, to establish independent works to supply water to itself and its inhabitants, and not to purchase the property and privileges of your petitioner as it was authorized to do by said act. And your petitioner says that if said city proceeds to establish such independent supply, the property and franchise of your petitioner will be greatly injured in value and may be rendered sub-
113 stantially worthless; and that your petitioner's plant and property was obtained for the express purpose of furnishing such supply of water, and is well adapted and has been thus far used therefor.

And your petitioner further represents that there is doubt whether the provisions of chapter 471 of the Act of the Year 1893 are adequate to enable your petitioner to obtain compensation for the injury which may be done to your petitioner by said city.

Wherefore your petitioner prays for the passage of an act providing and requiring that said city shall, before proceeding to supply water to itself or its inhabitants under the authority of said chapter 471, purchase the franchise, property and all the rights and privileges of your petitioner, and that your petitioner be authorized to make sale thereof; or that in some other suitable way your petitioner may be compensated for said threatened damage by said city.

THE NEWBURYPORT WATER COMPANY,
By JOHN E. McCUSKER, *Sup't.*

Exhibit G.

An act to provide for the purchase of the property of the Newburyport Water Company by the City of Newburyport.

Be it enacted, etc., as follows:

Sect. 1. The City of Newburyport shall, before proceeding to supply water to itself or its inhabitants under the authority of chapter four hundred and seventy-one of the Acts of the Year One thousand eight hundred and ninety-three, purchase from the Newburyport Water Company the franchise, corporate property, and all the rights

and privileges of said Newburyport Water Company, and said Newburyport Water Company is authorized to make sale of the same to said city. The compensation to be paid by said city to said company shall be determined by three commissioners to be appointed by the supreme judicial court, upon application of either party and notice to the other, whose award, when accepted by said court, shall be binding upon all parties.

SECT. 2. Upon petition by said Newburyport Water Company, the supreme judicial court shall have jurisdiction in equity, if said city shall proceed to supply itself or its inhabitants with water 114 before making the purchase aforesaid, to enjoin said city from so doing until it shall have made said purchase, and to compel it to make said purchase.

EXHIBIT H.

Acts and Resolves Passed by the General Court of Massachusetts for the Year 1894.

Chapter 474.

An act to provide for the purchase of the property of the Newburyport Water Company by the City of Newburyport.

Be it enacted, etc., as follows:

SECT. 1. If, within thirty days after the passage of this act, the Newburyport Water Company shall notify the mayor of the city of Newburyport, in writing, that it desires to sell to said city all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water, said city shall not proceed to supply water to itself or its inhabitants under the authority of chapter four hundred and seventy-one of the Acts of the Year Eighteen hundred and ninety-three, unless it shall have first purchased of said company the property aforesaid; and said company is authorized to make sale of said property to said city, and said city is authorized to purchase the same. Whenever said city shall, by a majority vote of the legal voters of said city present and voting thereon at a meeting called for that purpose, vote to purchase said property, notice of the desire of said company to sell the same having been given as hereinbefore provided, said company shall, within twenty days after the vote aforesaid, execute and deliver to said city proper deeds and instruments in writing, conveying to said city the property aforesaid, and said property thus conveyed shall thereupon become the property of said city, and said city shall pay to said company the fair value thereof, to be ascertained as hereinafter provided. If at the first meeting a majority of the voters present and voting do not vote to purchase said property, other

meetings may be called and held therefor. In case the said city
115 and the said company shall be unable to agree upon the value of said property, the supreme judicial court shall, upon application of either party and notice to the other, appoint three commissioners, two of whom shall be skilled engineers and the third learned in the law, who shall determine the fair value of said property for the purposes of its use by said city, and whose award, when accepted by the court, shall be final. Such value shall be estimated without enhancement on account of future earning capacity or good will, or on account of the franchise of said company.

SECT. 2. In case said Newburyport Water Company shall convey its property to the City of Newburyport, in accordance with the provisions of the preceding section, said city shall manage and use the property thus conveyed for the purposes and under the provisions of chapter four hundred and seventy-one of the Acts of the Year Eighteen hundred and ninety-three.

SECT. 3. The said city may, for the purpose of paying the necessary expenses and liabilities incurred under the provisions of this act, issue from time to time bonds, notes or scrip to an amount sufficient for such purpose; such bonds, notes or scrip shall bear on their face the words, "Newburyport water loan," shall be payable at the expiration of periods not exceeding thirty years from the date of issue, shall bear interest payable semi-annually at a rate not exceeding six per centum per annum, and shall be signed by the treasurer of the city and countersigned by the water commissioners provided for by chapter four hundred and seventy-one of the Acts of the Year Eighteen hundred and ninety-three. The said city may sell such securities at public or private sale, or pledge the same for money borrowed for the purposes of this act, upon such terms and conditions as it may deem proper, provided that such securities shall not be sold for less than the par value thereof. The city shall provide at the time of contracting said loan for the establishment of a sinking fund, and shall annually contribute to such fund a sum sufficient with the accumulations thereof to pay the principal of such loan at maturity. The said sinking fund shall remain inviolate and pledged to the payment of said loan, and shall be used for no other purpose.

SECT. 4. In case said city shall, in violation of section 1 of this act, proceed to supply itself or its inhabitants with water be-
116 fore making the purchase aforesaid, the supreme judicial court shall, upon petition of said company, have jurisdiction in equity to enjoin said city from so doing until it shall have made such purchase.

SECT. 5. This act shall take effect upon its passage.

Approved June 14, 1894.

117 *Stipulation.*

(Filed June 10, 1899.)

1. It is hereby stipulated and agreed, subject, however, to all objections by either party as to competency, materiality and relevancy, as follows:

(*a.*) That prior to the enactment of chapter 235 of the Acts and Resolves passed by the general court of Massachusetts in the year 1880, said general court passed an act or acts authorizing the defendant city to take and supply water, provided the act be accepted by a vote of the inhabitants, and that such vote was taken, and resulted in a failure to accept such act.

(*b.*) That the said act of 1880 was duly accepted by the incorporators named therein.

(*c.*) That on or about November 30, 1892, the mayor of said city, pursuant to an order by the city council of said city, presented to said general court the petition, a copy of which is set forth in paragraph 7 of the bill.

That at that time and theretofore, the plaintiff company was without municipal or other competition in supplying and distributing water to the inhabitants of said city.

That in said general court said petition was referred to the committee on water supply; that hearings were held by said committee; that said company opposed said petition, and opposed the passage of any act authorizing said city to compete with said company in furnishing water as aforesaid; that as a result of said petition and said opposition said general court enacted chapter 471 of Acts and Resolves passed by the general court of Massachusetts in the year 1893; that as a result of said opposition by said company the provisions of sections 12 and 13 of said act were added to the provisions petitioned for as aforesaid by said city.

(*d.*) That in the spring of 1889, the plaintiff company laid a pipe from its works to the Merrimac river, which it was not authorized by law to use as a source of water supply; that the town of Amesbury, having about 10,000 inhabitants, discharged its sewage into this river about 1½ miles *about* Newburyport, as did also the city of
118 Haverhill, of 27,000 inhabitants, 12 miles above, the city of Lawrence, of 44,000 inhabitants, 19 miles above, and the city of Lowell, of 77,000 inhabitants, about 24 miles above; that the cities of Lawrence and Lowell used the water of Merrimac river for purposes of domestic supply without filtration; that in June, 1892, the company without notice to the city, or its other customers, but with the knowledge of some of its customers, began to pump water from the river into its supply furnished the city and continued so to do at intervals, in varying quantities, pumping sometimes from the river from 155,000 to 225,000 gallons daily in a total consumption of from 500,000 to 600,000 gallons; that by a letter of

Nov. 3, 1892, the State board of health cautioned the company against the use of the Merrimac River water, and that but very little was pumped thereafter; that the board had previously disapproved the river as a source of domestic water supply, unless the water therefrom was filtered; that the company wholly discontinued the use of Merrimac river, in March, 1893; that some sickness in the city during the winter of 1892–'93 was attributed by some physicians and by the State board of health to this use of the Merrimac River water; that the foregoing facts were put in evidence, or were admitted by the company, before the legislative committee to which such petition was referred, and which reported to the legislature adversely to the petition of the City of Newburyport for an act authorizing it to establish an independent water supply, but that the legislature subsequently, at the same session, June 10, 1893, enacted chapter 471 of the Acts of 1893, annexed as Exhibit E to the plaintiff's bill.

(*e.*) That upon the vote upon the acceptance of the act of 1893, alleged in paragraph 8 of plaintiff's bill (Record, p. 6), and thereafter it was claimed by counsel for the defendant that chapter 471 of the Massachusetts Acts of 1893 was thereby duly accepted and had become effective, and that defendant had the right thereunder to supply said city and its inhabitants with water, and to receive revenue therefor; and defendant was so advised.

That thereupon, the water company presented to the legislature, prior to its session of 1894, the petition marked "Exhibit F," annexed to plaintiff's bill (Record, p. 40); that with said petition said company presented a form of bill entitled "An act to provide
for the purchase of property of the Newburyport Water Com-
119 pany by the city of Newburyport," a copy whereof marked "Exhibit G" is annexed to plaintiff's bill (Record, p. 41); that said petition was referred to the committee on water supply; that said committee held hearings upon said petition, and that at such hearings both plaintiff and defendant herein were represented; that, as the result of said petition by plaintiff, and the opposition thereto of defendant before said committee, chapter 474 of the Acts of 1894 was passed, a copy of which, marked "Exhibit H," is annexed to plaintiff's bill (Record, p. 41).

(*f.*) That after the enactment of Statute 1893, chapter 471, and before the enactment of Statute 1894, chapter 474, the city of Newburyport, claiming to act under authority of statute of 1893, employed an engineer to make some surveys, which involved expenses of about $1500, in reference to the establishment of an independent water supply. After the transfer of the company's plant to the city, and before the filing of this bill, the city expended not less than $32,340 in repairs and improvements of the property, and $16,285 in additions to it, and received the revenues from the property on the basis of the old rates.

(*g.*) That at the hearing before the legislative committee in March, 1894, the mayor of Newburyport made the statements contained in e affidavit of Thomas E. Major, on file in this case, and a copy of

which is annexed hereto, and further statements in answer to questions immediately following those in the affidavit, as follows:

"Q. That is what you want this committee to approve? A. No, sir. We want them to leave us as we were last year. Q. Your idea is that it will result in the ruin of the company? A. I don't think the company can run in competition with the city in supplying water to the citizens of Newburyport. Q. That means the loss of the entire capital of the company? A. I don't think they will lose anything, especially the old stockholders."

2. That the stockholders of the plaintiff company voted to offer, sell and convey the company's property to the defendant city, as set forth in paragraph 9 of the bill, because of their belief that the city of Newburyport was liable to compete with the water company, and because they believed that such competition would ruin the company.

120 (*a.*) That the vote, called a vote of the board of aldermen, stated at the foot of page 10 of the printed bill, was in fact a joint vote of the city council, and that said vote was communicated to the water company.

(*b.*) That the vote of the city, stated at the foot of page 9 of the printed bill, was in fact in the form stated in defendant's answer upon page 83 of the printed record.

(*c.*) That either party may refer to any part of the report of the commissioners appointed by the supreme judicial court to estimate the value of the property of the water company.

(*d.*) That the company notified the city, under the statute of 1893, section 12 and within the sixty days therein limited of its desire to sell to the city its property therein described.

(*e.*) That the petition for rehearing, set out on page 16 of the bill, was dismissed before the argument on the demurrer in this case.

3. This stipulation shall not prevent either party from offering further and other evidence under the pleadings, and is not intended to exclude any matters of which the court may take judicial notice.

ROBERT M. MORSE,
L. L. SCAIFE, *For Plaintiff.*
A. E. PILLSBURY,
For Defendant.

Agreement as to Withdrawal of Exceptions to Answer, etc.

(Filed June 15, 1899.)

It is hereby agreed,

(*a.*) That plaintiff's exceptions to defendant's answer may be withdrawn without costs;

(*b.*) That plaintiff's replication may be filed on or before June 20, 1899.

ROBERT M. MORSE,
L. L. SCAIFE, *For Plaintiff*
A. E. PILLSBURY,
For Defendant.

121 *Replication.*

(Filed June 15, 1899.)

This repliant, the plaintiff, saving and reserving to itself all and all manner of advantage of exception, which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendant, for replication thereunto says, that it doth and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, untrue, evasive and insufficient in law to be replied unto by this repliant; without this, that any other matter or thing in said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

LAURISTON L. SCAIFE,
Solicitor for Plaintiff.

Order of Court.

(June 20, 1899.)

COLT, *J.*:

In view of the following suggestion by the court in its rescript upon defendant's motion for leave to file special demurrer, to wit,

"The order of trial is within the control of the court. It can direct the constitutional question to be first heard. If the determination of that question is in defendant's favor the complainant can proceed no further. If the result is in complainant's favor the relief sought by the seventh prayer would still come up under defendant's answer,"

the parties to the above-named suit hereby consent that the following order may be made:

Ordered: That the constitutional question, to wit, whether or not the plaintiff has been deprived of its property without due
122 process of law in violation of the fourteenth amendment of the Constitution of the United States, be first heard; and that all questions as to plaintiff's relief, if any (including questions of valuation of the property alleged to have been taken), await the determination of the constitutional question.

By the court:

BENJ. H. BRADLEE,
Deputy Clerk.

ROBERT M. MORSE,
L. L. SCAIFE,
For Plaintiff.
A. E. PILLSBURY,
For Defendant.

Agreement as to Statement of Counsel to Commissioners.

(Filed June 22, 1899.)

It is hereby agreed, subject to objection by the defendant as to competency, materiality and relevancy, that, in the opening on behalf of the water company before the commissioners appointed by the State court under the act of 1894, counsel for the water company said to the commissioners as follows:

"The act of 1880, incorporating the company, gave the City of Newburyport the right, at any time after ten years from the completion of the works, to purchase the corporate property, rights and privileges of the company; and although the city has acquired the property by force of the act of 1894, we claim that we are entitled to the full compensation provided for in the act of 1880; and farther, that, if the effect of the act of 1894 be to take from the company, without compensation, any property or rights acquired by it under its charter, to that extent the act of 1894 is unconstitutional."
(Record of proceedings before commissioners, vol. 1, pages 27, 28.)

L. L. SCAIFE,
For Plaintiff.
A. E. PILLSBURY,
For Defendant.

123 & 124 *Affidavit of Thomas E. Major.*

(Filed July 21, 1897. Affidavit Referred to in Stipulation of June 10, 1899, Page 119.)

I, Thomas E. Major, of Malden, in the county of Middlesex and district of Massachusetts, make oath and say as follows:

That I assisted Rogers and Jones, stenographers, in reporting officially the testimony at the hearings before the legislative committee on water supply of the Massachusetts legislature, March 28, 1894, upon the petition of the Newburyport Water Company; that Orrin J. Gurney, mayor of Newburyport, testified in my presence, upon cross examination by R. M. Morse, Esq., as counsel for said Newburyport Water Company, as follows:

"Q. When you go into competition it would be with the view of ruining the water company?

A. No, sir; but with a view of the protection of the citizens; but I think that will be the natural effect, that the water company will be ruined.

Q. Then the plan you profess to adopt is one which in your expectation will involve the ruin of the company?

A. I do not see any other way for it; I do not think they can compete with the city."

THOMAS E. MAJOR.

Sworn to July 19, 1897.

125 *Stipulation.*

(Filed March 22, 1901.)

It is hereby agreed, if in the opinion of the court the testimony of the commissioners below referred to is competent evidence, is admissible at this stage of the case, and is material, that the commissioners appointed under Mass. St. of 1893, chap. 471, sect. 12, to value the property of the plaintiff company, if called as witnesses in this cause, would testify, without contradiction, that they did not in fact value as part of said property the contract between the company and the city, of which a copy marked "Exhibit D" is annexed to the plaintiff's bill, it being their opinion that the same in law could not be valued; and it is also agreed that the same shall be dealt with in like manner as if said commissioners had so testified before the commissioner appointed by the court in this case, and as if said objections as to competency, materiality, and admissibility at this stage of the case had been duly taken before such commissioner and reserved for the consideration of the court; and it is also agreed that the petitioner at the hearing put the contract in evidence under objection; and that the commissioners viewed and examined the plant, two of them being engineers; and that evidence was submitted bearing upon the cost to the company of furnishing water, but no evidence of the quantity of water supplied to the city under the contract, nor any direct evidence of the cost of performing the contract or of its value to the company; that respondent's counsel in his closing argument asked petitioner's counsel if he waived the claim to have the contract valued, and the latter replied that he did not waive it and was not prepared to say what use he should make of it; that thereupon respondent's counsel proceeded to argue that the contract should not be valued; that the petitioner's counsel in his closing argument mentioned the contract as one of the items of property which the company had parted with to the city, and urged, but not in this connection, that it was the duty of the commissioners to estimate the value of all the property of the company as one whole; and that in the proceedings in the State court upon
126 the report of the commissioners the company made no claim that the contract should be or had not been valued, and raised no question concerning it.

It is further agreed that all questions of relief shall await final determination of the question whether the plaintiff is entitled to any relief, unless the circuit court shall hold the evidence above recited to be admissible and material, and in view thereof shall decree that the plaintiff is entitled to relief, notwithstanding the decision rendered August 8, 1900.

NEWBURYPORT WATER CO.,
By ROBERT M. MORSE, *Its Attorney.*
A. E. PILLSBURY,
For the City of Newburyport.

127 *Transcript of Record of Circuit Court.*

UNITED STATES OF AMERICA, }
District of Massachusetts, } ss:

At a circuit court of the United States for the first circuit begun and holden at Boston within and for the district of Massachusetts, on Tuesday, the fifteenth day of October in the year of our Lord one thousand nine hundred and one. Before the Honorable Le Baron B. Colt, circuit judge.

NEWBURYPORT WATER COMPANY, Complainant,
v.
CITY OF NEWBURYPORT, Defendant. } No. 924. Equity.

The bill of complaint in this cause was filed in the clerk's office on the twenty first day of July, A. D. 1897, and was duly entered at the May term of this court, A. D. 1897, and is in the words and figures following:

128 *Bill of Complaint.*

(Filed July 21, 1897.)

(MEMORANDUM.—The bill of complaint, as printed in this transcript of record, commencing on page 1, is here inserted. Alex. H. Trowbridge, clerk.)

At the same term the following amendment to bill was filed:

Amendment to Bill.

(Filed Sept. 1, 1897.)

(MEMORANDUM.—The amendment to bill, as printed in this transcript of record, commencing on page 73, is here inserted. Alex. H. Trowbridge, clerk.)

Also at the same term the following motion to dismiss bill for want of jurisdiction was filed:

Motion to Dismiss Bill for Want of Jurisdiction.

(Filed Sept. 9, 1897.)

The City of Newburyport, the respondent, appearing specially in the above entitled cause, and only for the purpose of objecting to the jurisdiction, moves that the complainant's bill be dismissed, on

the ground that it appears upon the face thereof that the court has no jurisdiction to entertain the same, or to administer any relief thereon.

And said respondent further moves that the hearing of the complainant's application for preliminary injunction, and all other proceedings in the cause, be stayed or suspended to await the hearing and determination of the foregoing motion to dismiss the bill.

A. E. PILLSBURY,
Solicitor and of Counsel for the Respondent,
The City of Newburyport.

129 On the thirteenth day of September, A. D. 1897, the foregoing motion to dismiss bill for want of jurisdiction was heard and denied by the court, the Honorable Le Baron B. Colt, circuit judge, sitting.

On the twenty seventh day of September, A. D. 1897, the following demurrer was filed:

Demurrer.

(Filed Sept. 27, 1897.)

(MEMORANDUM.—The demurrer, as printed in this transcript of record, commencing on page 75, is here inserted. Alex. H. Trowbridge, clerk.)

This cause was thence continued to the October term, A. D. 1897, when the same came on to be heard and was fully heard by the court, on demurrer, the Honorable Le Baron B. Colt, circuit judge, sitting, on the twenty third, twenty fifth and thirtieth days of October, 1897.

On the twenty fourth day of February, A. D. 1898, an opinion of the court was announced, overruling said demurrer.

At the said October term, A. D. 1897, the following claim of appeal was filed:

Claim of Appeal.

(Filed March 22, 1898.)

In the above entitled cause, the respondent, The City of Newburyport, appeals from the judgment and decree overruling its demurrer to the complainant's bill.

A. E. PILLSBURY,
C. C. DAME,
R. E. BURKE,
Solicitors and of Counsel for the Respondent.

130 Also at the same term the following petition for rehearing on demurrer was filed:

Petition for Rehearing on Demurrer.

(Filed April 14, 1898.)

To the honorable the judges of the circuit court of the United States in said district:

The City of Newburyport, the defendant in said cause, respectfully applies for a rehearing of its demurrer filed to the plaintiff's bill, for the following cause:—It appears from the opinion of the court upon the demurrer that in the original hearing thereon the defendant so far failed to make its position clear to the court that the court has overlooked and omitted to consider the propositions upon which the defendant principally relied in support of the demurrer, and the authorities, most of them binding upon this court, cited in the defendant's brief in support thereof, especially in the following particulars:

1. The defendant took and relied upon the position that the plaintiff, in view of its proceedings under the Massachusetts act of 1894 as set out in the bill, must be held to have waived any objection to the constitutionality or validity of said act, and to be now estopped to question the same. This position is supported by the authorities, many of them binding upon this court, cited on pages 15, 16, 17 and 30 of the defendant's printed brief filed at the hearing. This argument and these authorities are not alluded to in the opinion of the court, and do not appear to have been considered.

2. The court in its opinion dismisses the defendant's objection that the present bill is an attempt to review and retry a case already tried and determined in the State court by saying:—"The answer to this is that the constitutional questions set out in this bill were not raised in the State court, and could not have been drawn
131 in question in that suit," and therefore, that "the objection that the complainant should have raised the question in that suit fails to the ground and constitutes no defence to the present bill." The essence of all the constitutional questions raised in this bill is in the averment that to compel the plaintiff to part with its property at a price ascertained in accordance with the valuation clauses of section 1 of the act of 1894 constitutes in effect a taking of property without just compensation, in violation of the Federal Constitution. Upon the face of the bill the only unconstitutionality, if any, lies in the valuation clauses of the act of 1894. That there was a taking of property presents no Federal question. The only Federal question is in the averment of a taking without just compensation, and the only Federal question, if any, arises out of the alleged failure of compensation, which concerns alone the valuation clauses of the act of 1894. It is plain beyond question that the constitutionality of these valuation clauses could have been raised in the plaintiff's proceedings in the State court, by asking for such

construction as the plaintiff desired to be put upon them, and claiming that any different construction would be in violation of the Constitution of the United States; and that a final determination of all these questions could have been obtained in that proceeding by writ of error to the Supreme Court of the United States. In taking the position announced in the opinion, the court appears to have overlooked this fact and argument. The Massachusetts cases cited by the court are different from the present case in this particular, and furnish no authority for the position that the valuation clauses of the act of 1894 could not have been questioned in the plaintiff's proceedings in the State court.

3. Upon the question of laches appearing upon the face of the bill, relied on as a defence thereto, the court assigns as its reason for overruling the demurrer that "the bill was brought before the suit in the State court was finally determined and before the acceptance by the complainant of the award."

132 The defendant did not urge or rely upon any laches after the proceedings in the State court and before the bringing of this bill. It relied and still relies on the plaintiff's laches throughout the proceedings in the State court and during the entire period of two years preceding the bringing of the bill. It is plain that the question of the validity of the Massachusetts act of 1893 could have been raised by the plaintiff, by original proceeding in the State court, or in this court if it can now be raised here, prior to the passage of the act of 1894. It is equally plain that all the questions raised in the present bill, of the validity of the act of 1894 or of the act of 1893, could have been raised by the plaintiff by original bill in this court, if they can now be raised here, at any time after the passage of the act of 1894, and before the plaintiff began its proceedings in the State court. It is equally plain that all questions of the constitutionality or validity of the valuation clause of section 1 of the act of 1894, which is the only part of the act complained of or involving any Federal question, could have been raised and availed of by the plaintiff in the proceedings which it actually brought in the State court, and a final adjudication of the Supreme Court of the United States obtained thereon in that proceeding. The laches relied on by the defendant is in omitting to raise any constitutional question throughout the whole course of that proceeding, and throughout the period of two years which it occupied, either in that or in this court, until that proceeding was terminated by an award of an amount unsatisfactory to the plaintiff. This position is supported by the authorities, many of them binding upon this court, cited on pages 5, 6, 7, 9 and 14 of the defendant's brief, and by Forsyth *v.* Hammond, 166 U. S. 506, none of which are alluded to in

133 the opinion of the court or appear to have been considered.

4. The court assumes in its opinion that the plaintiff's conveyance of its property was involuntary and compulsory, because it is so alleged in the bill. The facts bearing upon this question are fully set out in the bill, and they do not support but are inconsistent with this allegation. The defendant is not concluded by the

allegation if the facts set out do not support it or are inconsistent with it. This position is supported by the authorities, many of them binding upon this court, cited on pages 19, 20 and 35 of the defendant's brief, which are not alluded to in the opinion and do not appear to have been considered.

5. The facts disclosed in the bill show that the plaintiff's conveyance cannot in law be deemed to have been involuntary or compulsory, and that it was not made under any circumstances amounting to legal compulsion or duress. This position is supported by the authorities cited on pages 27 and 28 of the defendant's brief, to which argument or authorities no allusion is made in the opinion, and they do not appear to have been considered.

6. It is clear that duress or compulsion, if shown, while it may give the plaintiff a right in equity to avoid its deed, does not necessarily amount to a taking of its property without just compensation, or to any other violation of the Federal Constitution or any Federal right of the plaintiff, nor give this court jurisdiction of the bill. This position of the defendant is not alluded to in the opinion and does not appear to have been considered.

7. The essence of the plaintiff's bill, as the court assumes in its opinion, is in the averment of a taking of its property without just compensation. Whether there was a taking of its property is a question and conclusion of law. The assertion of a taking is not enough, and the defendant is not bound by it. This position is supported by the authorities, many of them binding upon
134 this court, cited on pages 19, 20 and 35 of the defendant's brief, to which authorities or argument no allusion is made in the opinion, and they do not appear to have been considered.

8. The facts disclosed in the bill show that there was no taking in law of any part of the plaintiff's property, and nothing which can be held in law to amount to a taking of its property; still less to a taking of its property without just compensation, or any other violation of the Federal Constitution. This position is supported by the authorities, many of them binding upon this court, cited on pages 21, 23, 24, 25 and 26 of the defendant's brief. The opinion makes no allusion to this argument or to these authorities, and they do not appear to have been considered.

9. It is clear from the bill, and the court assumes in its opinion, that the only taking of the plaintiff's property without compensation, if there was any taking, was of its franchise rights. It is within the power of the legislature of Massachusetts to wholly repeal all franchise rights of the plaintiff at its pleasure without making or providing compensation therefor. It must therefore be still more within its power to provide for a voluntary sale of the plaintiff's property at a price which should not be enhanced by or on account of its franchise rights. This position is supported by the authorities, many of them binding upon this court, cited on pages 20, 23, 24, 25 and 37 of the defendant's brief. The opinion of the court makes no allusion to this argument or to these authorities, and they do not appear to have been considered.

10. It is clear upon the face of the bill that no franchise rights of the plaintiff passed to the defendant under the act of 1894, or the proceedings set out in the bill, as the act of 1894 neither required nor authorized such transfer of its franchise rights by the
135 plaintiff, nor their purchase by the defendant. It is clear that the form of the defendant's deed in this respect could not enlarge the statute or vary its effect. It is clear that the defendant city holds its franchise rights to supply water and take rates therefor, by direct grant from the legislature under the acts of 1893 and 1894, as the supreme court of Massachusetts has held which decision concludes this court upon this question. It is therefore clear that the defendant has acquired by the proceedings no franchise rights of the plaintiff, and cannot therefore be under obligation to make compensation for any such rights. So far as appears by the opinion, the court seems to have overlooked this fact and argument, especially as set out on pages 33, 37, 38 and 40–44 in the defendant's brief.

11. The court in its opinion says: "The bill further avers that the action of the water commissioners under the act of 1894 resulted in the deed of January 29, 1895, and that such conveyance by the water company was voluntary in name and form only" etc. The defendant does not understand this passage of the opinion, as no action of any water commissioners under the act of 1894 is alleged in the bill, and as all the action of the valuation commissioners appointed under the act of 1894 was after the deed of January 29, 1895, and therefore could not have resulted in that deed, and therefore it cannot be the action of these commissioners which is thus referred to by the court. As the defendant is unable to understand what is thus referred to, and is unaware what bearing this may have had upon the decision, it feels the need of further opportunity to inquire into this point.

The defendant is advised and believes that these positions, several of them separately, constitute a full defence to the plaintiff's
136 bill, and that all the facts necessary to make them fully available to the defendant are set out in the bill and are before the court on the demurrer, and that it has a legal right to the full benefit of all of them at this stage of the case. The authorities cited on pages 19 and 20 of the defendant's brief, many of them binding upon this court, support this position. So far as appears by its opinion, the court does not seem to have considered either of these positions or the authorities cited in support of them, with a single exception, upon the question of laches, upon which the opinion seems to attribute to the defendant a position which it is not aware of having taken, and omits to notice the position which it did take or the authorities cited in support of it. The trial of the facts set out in this bill will put the defendant to great vexation, delay and expense, for which, as the defendant is advised, the bill furnishes no sufficient ground or justification, and to which the defendant ought not to be subjected without a full hearing and full consideration of all arguments and authorities tending to support the demurrer. For these reasons the defendant respectfully applies for

a rehearing thereon, to the end that its defences to the bill, as they appear upon the demurrer, and the authorities in support thereof, may be fully heard and considered by the court.

CITY OF NEWBURYPORT,
By GEORGE H. PLUMER, *Mayor*.

A. E. PILLSBURY,
C. C. DAME,
R. E. BURKE,
Of Counsel.
HORACE I. BARTLETT,
City Solicitor.

137 DISTRICT OF MASSACHUSETTS, *April 13th*, 1898.

Personally appeared said George H. Plumer who subscribed the foregoing petition in behalf of the City of Newburyport, and made oath in behalf of said city that the same is true according to the best of his knowledge, information and belief.

Before me,

GRANT M. PALMER,
[SEAL.] *Notary Public.*

Also at the same term the following answer was filed by consent:

Answer.

(Filed by consent April 14, 1898.)

(MEMORANDUM.—The answer, as printed in this transcript of record, commencing on page 79, is here inserted. Alex. H. Trowbridge, clerk.)

Also at the same term the following complainant's exceptions to defendant's answer were filed by consent:

Complainant's Exceptions to Defendant's Answer.

(Filed by consent May 9, 1898.)

(MEMORANDUM.—The complainant's exceptions to defendant's answer, as printed in this transcript of record, commencing on page 96, are here inserted. Alex. H. Trowbridge, clerk.)

This cause was thence continued from term to term to the October term, A. D. 1898, when the petition for rehearing was heard and denied by the court, the Honorable Le Baron B. Colt, circuit judge, sitting.

138 At the same term the following special demurrer was received:

Special Demurrer, Nov. 17, 1898.

The defendant, The City of Newburyport, not waiving any rights under its general demurrer heretofore filed, but reserving and insisting upon its rights thereunder and under its appeal from the decision of the court thereon, so far as it may lawfully do, and without admitting the jurisdiction of the court, demurs specially to the seventh prayer for relief in the plaintiff's bill, praying that this court ascertain, declare and decree payment of the compensation to be paid the plaintiff for its property acquired by the defendant as set forth in the bill, and demurs specially to the bill in so far as it seeks or sets forth, or purports to set forth or show, any right or claim to the relief sought by said seventh prayer, (no particular part of said bill being directed solely or specifically to, or in support of, said claim, and it being impracticable to further point out or separate by paragraphs or pages any particular part or parts of the bill to which this demurrer especially applies, except said seventh prayer for relief), upon the following ground, namely:

It appears by the bill that the defendant city came into possession of such property of the plaintiff described in the bill as it has ever acquired possession of, by vote of its inhabitants to purchase the same under and in accordance with a vote of the plaintiff corporation to sell the same to the defendant, as set forth on pages 9 and 10 of the printed bill, and under and agreeably to the Massachusetts statute of 1894, of which a copy called "Exhibit H" is annexed
139 to the bill; that it appears by the bill and by the terms of the statute therein set forth that said vote of the inhabitants of the defendant city was a vote to purchase said property for and in consideration of the fair value thereof to be ascertained as provided in said statute; that the method of ascertaining such value, which by the terms of the statute was to constitute the purchase price of said property, was by agreement of the parties or in default thereof by determination of its value by three commissioners appointed by the supreme judicial court of Massachusetts, under and according to the rule of valuation prescribed by said statute; that it appears by the bill (paragraph 11) that the parties were unable to agree upon the price to be paid for the property, and that this left the value thereof, and the price to be paid therefor, to determination by the commissioners, as provided in the statute; and that the plaintiff proceeded for and obtained such determination; that whether such vote of purchase by the inhabitants of the defendant city amounted, as alleged in the bill, to a taking of the plaintiff's property without just compensation in violation of the Federal Constitution, or did not amount to such taking, it appears by the bill that the defendant city has not sought to acquire, and has not acquired, any property of the plaintiff upon any other terms, or at any other value or price, than the terms, price or value prescribed by the statute; that such vote of the inhabitants of the defendant city, in connection with the plaintiff's

offer of sale of its property set forth in the bill, constituted either a purchase or a taking thereof at the value or price ascertained in accordance with the terms of the statute, and at no other value or price whatever; that whether the plaintiff is, as alleged in the bill, entitled to avoid such purchase or the transfer of its property thereunder, or is not entitled to avoid the same, it ap-
140 pears by the bill that the defendant city cannot be held to take title to, or retain the title or possession of, any property of the plaintiff which has or has not come into its possession under said vote, except at the price or value fixed in accordance with the terms of the statute; and that if the defendant city has not acquired such property at such price, it has not acquired it at all; and is not liable, and cannot be held, to pay for it or for any part of it; that the defendant city cannot be required to take, hold or retain any property of the plaintiff at or in consideration of any other price or value, or be bound or be liable to pay for the property acquired from the plaintiff company, or any part thereof, any other value or price than the value or price fixed under and in accordance with the terms of the statute: that this court has no power, authority or jurisdiction to impose upon the defendant city any different obligation or liability to payment for said property than that which was assumed by or resulted from the vote of its inhabitants as set forth, or to assess, ascertain or declare the price or value at which the defendant city shall retain the property of the plaintiff, or any part thereof, or the compensation to be paid the plaintiff by the defendant city therefor; and that any and all inquiry into such price, value or compensation, by or under the authority of this court, will be inconclusive, ineffectual and void.

Wherefore the defendant says that it ought not to be held to farther answer the plaintiff's bill, so far as it seeks or prays assessment or ascertainment of the price or value of or the compensation due the plaintiff for said property, or any part thereof, or an order or decree for payment thereof; and prays that said bill, as to all that part thereof, be dismissed.

A. E. PILLSBURY,
HORACE I. BARTLETT.
City Solicitor,
CHARLES C. DAME,
ROBERT E. BURKE,
Solicitors and of Counsel for the Defendant

141 UNITED STATES OF AMERICA, }
District of Massachusetts. }

NEWBURYPORT, *July* 27, 1898.

I, George H. Plumer, mayor of the city of Newburyport, on oath depose and say in behalf of the respondent that the foregoing demurrer of said city to the bill of complaint in the above entitled cause is not interposed for delay.

GEO. H. PLUMER, *Mayor.*

Subscribed and sworn to by the said George H. Plumer before me,

JOHN T. BROWN,
Notary Public.

[SEAL.]

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

A. E. PILLSBURY.
HORACE I. BARTLETT,
City Solicitor.
CHARLES C. DAME.
ROBERT E. BURKE.

On the thirty-first day of December, A. D. 1898, the Honorable Le Baron B. Colt, circuit judge, sitting, an amendment of the seventh prayer of the bill of complaint was allowed in open court, by consent of court and of all parties, by transposing terms "plaintiff," and "defendant" in sixth line of page twenty-one of printed record.

142 On the same day, this cause came on to be heard and was fully heard on motion for leave to file special demurrer, the Honorable Le Baron B. Colt, circuit judge, sitting.

On the seventh day of January, A. D. 1899, the following rescript was filed:

Rescript.

January 7, 1899.

COLT, *J.:*

The filing of a special demurrer at this stage of the case is within the sound discretion of the court.

The demurrer is limited to the seventh prayer of the bill. The prayer is an alternative form, and asks that if the defendant be permitted to retain the property in controversy, the amount of just compensation may be ascertained and ordered paid by the defendant.

The motion is denied for the following reasons:

(1.) The general demurrer, containing seven sub-divisions, was filed September 27, 1897, and overruled February 24, 1898. The motion for leave to file a special demurrer was not made until November 17, 1898. The special demurrer could have been filed with the general demurrer.

(2.) The answer to the bill was filed April 14, 1898, and exceptions to the answer May 9, 1898.

The statement in the answer, "not waiving any rights under its demurrer heretofore filed," plainly refers to the general demurrer already filed, and not the filing of any subsequent special demurrer.

Further, the defendant has included in the twenty-first paragraph of its answer the same claim which is set up in the special demurrer.

(3.) The relief granted can be limited by the decree.

The order of trial is within the control of the court. It can direct

the constitutional question to be first heard. If the determina-
143 tion of that question is in defendant's favor the complainant can proceed no further. If the result is in complainant's favor the relief sought by the seventh prayer would still come up under defendant's answer.

Motion denied.

This cause was thence continued to the May term, A. D. 1899, when the following stipulation was filed:

Stipulation.

(Filed June 10, 1899.)

(MEMORANDUM.—The stipulation, as printed in this transcript of record, commencing on page 117, is here inserted. Alex. H. Trowbridge, clerk.)

At the same term the following replication was filed:

Replication.

(Filed June 15, 1899.)

(MEMORANDUM.—The replication, as printed in this transcript of record, on page 121, is here inserted. Alex. H. Trowbridge, clerk.)

Also at the same term the following agreement as to withdrawal of exceptions to answer, etc., was filed:

Agreement as to Withdrawal of Exceptions to Answer, etc.

(Filed June 15, 1899.)

(MEMORANDUM.—The agreement as to withdrawal of exceptions to answer, etc., as printed in this transcript of record, on page 120, is here inserted. Alex. H. Trowbridge, clerk.)

144 Also at the same term the following order of court was entered:

Order of Court.

June 20, 1899.

(MEMORANDUM.—The order of court, as printed in this transcript of record, commencing on page 121, is here inserted. Alex. H. Trowbridge, clerk.)

Also at the same term the following agreement as to statement of counsel to commissioners was filed:

Agreement as to Statement of Counsel to Commissioners.

(Filed June 22, 1899.)

(MEMORANDUM.—The agreement as to statement of counsel to commissioners, as printed in this transcript of record, on page 122, is here inserted. Alex. H. Trowbridge, clerk.)

Also at the same time, this cause came on to be heard and was fully heard by the court, the Honorable Le Baron B. Colt, circuit judge, and the Honorable Arthur L. Brown, district judge for the district of Rhode Island, duly assigned to hold said circuit court, sitting, pursuant to stipulation and order of court of June 20, 1899.

This cause was thence continued from term to term, under advisement, to the May term, A. D. 1900, when the opinion of the court was announced and a decree ordered to be entered pursuant to said opinion.

This cause was thence continued to the October term, A. D. 1900, when the following stipulation was filed:

145 *Stipulation.*

(Filed March 22, 1901.)

(MEMORANDUM.—The stipulation, as printed in this transcript of record, commencing on page 125, is here inserted. Alex. H. Trowbridge, clerk.)

This cause was thence continued to the May term, A. D. 1901, when the following motion for final decree was filed:

Motion for Final Decree.

(Filed May 22, 1901.)

This cause came on to be further heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it is adjudged and decreed that the plaintiff has not been deprived of its property without due process of law in violation of the fourteenth amendment to the Constitution of the United States; and it is thereupon further ordered, adjudged and decreed that the plaintiff's bill be dismissed, with costs to the defendant to be taxed by the clerk.

The defendant moves for entry of the foregoing decree.

A. E. PILLSBURY,
Solicitor and of Counsel.

At the said May term, A. D. 1901, this cause came on to be heard and was fully heard by the court, on questions raised by stipulation filed March 22, 1901, it being orally agreed that said hearing shall be also a final hearing, the Honorable Le Baron B. Colt, circuit judge, and the Honorable Arthur L. Brown, district judge as aforesaid sitting.

146 This cause was thence continued under advisement to the present October term, A. D. 1901, when the opinion *per curiam* is announced, denying the motion to reopen the case, and granting the motion to enter a final decree dismissing the bill.

On the fifth day of March, A. D. 1902, it is ordered by the court, the Honorable Le Baron B. Colt, circuit judge, and the Honorable Arthur L. Brown, district judge as aforesaid sitting, that the second docket entry of May 22, 1901, be amended so as to read as follows:

"May 22.—Heard before Colt and Brown, JJ. on questions raised by stipulation filed March 22, 1901, it being orally agreed that said hearing shall be also a final hearing in the case."

It is further ordered that the opinion *per curiam* filed January 21, 1902, be amended and the docket entry of that date vacated.

On the fifth day of March, A. D. 1902, an amended opinion *per curiam* is announced and filed.

On the same day the motion for final decree is granted and the following final decree is entered:

Final Decree.

March 5, 1902.

COLT and BROWN, *JJ.:*

This cause came on to be further heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it is adjudged and decreed that the plaintiff has not been deprived of its property without due process of law in violation of the

147 fourteenth amendment, and that the obligation of no contract of the plaintiff has been impaired in violation of the contract clause, of the Constitution of the United States; and it is thereupon further ordered, adjudged and decreed that the plaintiff's bill be dismissed, with costs to the defendant to be taxed by the clerk.

By the court:

L. C. TUCKER,
Deputy Clerk.

From the final decree the complainant claims an appeal to the Supreme Court of the United States, and gives good and sufficient security that it will prosecute its appeal to effect and answer all damages and costs if it fail to make its plea good, and said appeal is allowed accordingly.

A true record.

Attest: ALEX. H. TROWBRIDGE, *Clerk.*

148 Circuit Court of the United States, District of Massachusetts.
In Equity.

NEWBURYPORT WATER COMPANY
v.
CITY OF NEWBURYPORT. } No. 924.

Opinion of the Court.

February 24, 1898.

COLT, *J.:*

The present hearing was had on demurrer to the bill of complaint. The principal question raised by the bill is whether the Massachusetts act of 1894 (chapter 474), as construed by the State court, is in violation of the fourteenth amendment of the Constitution of the United States.

That act, as interpreted by the State court, allowed the complainant no compensation for the value of its franchises or on account of its future earning capacity or good-will.

The demurrer assumes the truth of the allegations contained in the bill, which are properly pleaded, and we will only refer to such as we deem material.

It appears from the bill that the water company was duly incorporated under the Massachusetts Statutes of 1880, chapter 235, for the purpose of furnishing the city of Newburyport with water, and that it conducted its business until January 29, 1895.

Section 11 of its charter provided that the city should have the right at any time after ten years from the date of the completion of the water works to purchase the property, and all the rights and privileges of the company, at such price as might be mutu-
149 ally agreed upon, and, in case the water company and the city were unable to agree, the compensation was to be determined by three commissioners to be appointed by the State court. The city did not avail itself of the right to purchase under this act.

In 1893 the legislature passed an act which authorized the city of Newburyport to supply itself with water. Stat. 1893, chapter 471.

By section 12 of that act it was provided that at any time within sixty days after the passage of the act the water company might notify the mayor of Newburyport in writing that it desired to sell to the city its corporate property, and all the rights and privileges of the company, and to execute and deliver to the city proper deeds and instruments in writing, conveying to said city the property aforesaid: "Provided, however, the legal voters of the city of Newburyport, at legal meetings to be called in the several wards of said city within six months after said notification has been received as aforesaid, shall, by a majority vote of the voters of said city present and

voting thereon at said meetings, vote to purchase the aforesaid property upon the terms and conditions contained in this section, whereupon the property thus conveyed shall become the property of the City of Newburyport, and said city shall be liable to pay to said company the fair value of the property thus conveyed." Section 13 provided that "after the vote provided for in section 12 of this act, or provided the Newburyport Water Company does not so notify the said mayor within the sixty days, this act shall be submitted to the legal voters of the city of Newburyport for their acceptance or rejection, at legal meetings to be called in the several wards of said city within eight months from the passage of this act, and shall take effect from and after its acceptance by a two-thirds vote of the voters of said city present and voting thereon at said meetings."

Within sixty days after the passage of this act the water company notified the city of its desire to sell under the provisions of the act. On August 25, 1893, the city by a majority vote declined to purchase the property; but on September 7, 1893, voted the acceptance of chapter 471 of the act of 1893, authorizing it to build new water works.

The act of 1894 (Stat. 1894, chap. 474) provided that within
150 thirty days after the passage of the act the water company should notify the mayor of the city of Newburyport in writing, that it desired to sell to the city "all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water, said city shall not proceed to supply water to itself or its inhabitants under the authority of chapter 471 of the Acts of the Year 1893, unless it shall have first purchased of said company the property aforesaid, and said company is authorized to make sale of said property to said city, and said city is authorized to purchase the same." The act further provides for a meeting of the legal voters to vote upon the question of purchase, and that if the city shall vote to purchase, the water company shall execute and deliver to the city proper deeds and instruments in writing "conveying to said city the property aforesaid, and said property thus conveyed shall thereupon become the property of said city, and said city shall pay to said company the fair value thereof, to be ascertained as hereinafter provided." And further, that in case the city and water company should be unable to agree upon the value of said property, the supreme judicial court shall appoint three commissioners to determine the fair value of said property for the purposes of its use by said city, and whose award when accepted by the court shall be final. "Such value shall be estimated without enhancement on account of future earning capacity or good will, or on account of the franchise of said company."

Within thirty days after the passage of this statute, a meeting of the stockholders of the water company was held, and a vote was adopted, to the effect that the company desired to sell to the city the

property described in the statute, and notice of said vote was on the same day sent to the city, and on January 15, 1895, a majority of the legal voters of said city voted to purchase the property of the water company, and on January 29, 1895, the water company conveyed its corporeal property to the city, and in paragraph 26 of its deed it purported to convey "all the rights, privileges and easements heretofore acquired under chapter 235 of the Acts of the Legislature of Massachusetts for the Year 1880, and now used by said com-
151 pany, of laying and maintaining water pipes and mains in said streets, and of making connections therewith for the purpose of supplying said city and the inhabitants thereof with water, and all property, property rights, corporate property, privileges, easements, waters and water rights of said company, whether herein particularly described or not, and all the rights and franchises of said company, whether for supplying water to the city of Newburyport and the inhabitants thereof, and of collecting water rates therefor, or otherwise, hereby conveying to said city all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water."

On January 31, 1895, the city took possession of the property of the water company, and as the water company and the city were unable to agree upon the price to be paid for the property, the water company on February 7, 1895, petitioned the court for the appointment of commissioners under the act of 1894. The commissioners were duly appointed and their report made February 3, 1897, showed that in their view the statute of 1894 excluded from their consideration any valuation of the franchise right of the company, or of its future earning capacity or good will.

The questions of law were reserved and argued before the full court, and on June 14, 1897, the court rendered an opinion holding that the decision of the commissioners was correct, and that under the act of 1894 the city was not required to pay the water company anything for its franchises, future earning capacity or good-will.

Subsequently the water company petitioned for a rehearing in the State court.

The bill alleges that the value of the rights of the water company which were excluded by the commissioners amounted to $475,000, and that the State court held they were properly so excluded under the act of 1894.

The bill further avers that after the passage of the act of 1893, permitting the city to build competing water works, the water company petitioned the legislature that the City of Newburyport should, before supplying its inhabitants with water, purchase "the
152 franchise, corporate property and all the rights and privileges of said Newburyport Water Company." As a result of this petition the legislature passed the act of 1894.

The bill further avers that the action of the water commissioners under the act of 1894 resulted in the deed of January 29, 1895, and

that such conveyance by the water company "was voluntary in name and form only, and was in fact compulsory; and that said offer of sale and deed were made by said company to said City of Newburyport 'under the threat of municipal competition' by said city, and to avoid the ruin which would have resulted from such competition by said city; and that the said acts by which said city came into and obtained possession of the property described in said deed constituted a taking of such property in violation of the rights secured to plaintiff by the Constitution of the United States."

The bill (among other things) prays that chapter 474 of the act of 1894 may be decreed to be unconstitutional, and the deed cancelled and the property received thereunder restored to the complainant, or if the defendant is permitted to retain the property upon paying to the complainant just compensation for the entire property, the amount of compensation may be ascertained and the defendant be ordered to pay to the complainant the amount thereof.

The defendant demurs to the bill for want of jurisdiction, want of equity and on other grounds.

It is contended that on the face of the bill this is an attempt to review and retry here a case between the same parties already tried and determined in the State court.

The answer to this is that the constitutional questions set out in this bill were not raised in the State court and could not have been drawn in question in that suit.

Moore v. Sanford, 151 Mass., 285.
Pitkin v. Springfield, 112 Mass., 509.

In *Moore v. Sanford*, the plaintiffs, in 1885, filed a petition under the statute for damages sustained by the taking of their lands, and in 1889 brought a bill in equity to test the constitutionality of the statute, and to set aside the taking as unconstitutional. In holding that the plaintiffs had a right, by an independent proceeding,
153 to dispute the validity of the taking and the constitutionality of the act, the court said:

"The plaintiffs were entitled to have the question of the constitutionality of the statute determined, and under their petition for damages they were, by necessary inference, compelled in that proceeding to admit that it was constitutional."

If the question of the constitutionality of the act of 1894 was not open to the complainant in the proceeding in the State court, the objection that the complainant should have raised the question in that suit falls to the ground, and constitutes no defence to the present bill.

Nor do we think that the complainant is chargeable with such laches as to bar its right to bring this bill.

The bill was brought before the suit in the State court was finally determined, and before the acceptance by the complainant of the award.

Moore v. Sanford, ubi supra.

The fundamental question raised by the demurrer is whether the bill sets out a cause of equitable relief, or a "taking" of the complainant's property without "due process of law" or just compensation, in violation of the fourteenth amendment of the Constitution of the United States.

The bill alleges that the deed of the water company to the city under the act of 1894 was voluntary in name and form only, and was in fact compulsory, and was made under threat of competition by the city and to avoid the ruin which would have resulted from such competition, and that this constituted a "taking" in violation of a constitutional right.

We must assume, for the purpose of this demurrer, that the complainant took advantage of the act of 1894, under a threat of competition by the city which would have been ruinous to its property, and that its subsequent acts and conduct resulted from such threat. It further appears that under the construction given to the act of 1894 by the State court no compensation was allowed the complainant for its franchise rights, future earning capacity, or goodwill.

In *Swift Co v. United States*, 111 U. S., 22, a payment made to a public officer in discharge of a fee or tax illegally exacted is
154 not such a voluntary payment as will preclude the party from recovering it back. The court said:

"The question is, whether the receipts, agreements, accounts and settlements made in pursuance of that demand and necessity were voluntary in such sense as to preclude the appellant from subsequently insisting on its statutory right.

We cannot hesitate to answer that question in the negative. The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction, or discontinue its business. It was in the power of the officers of the law, and could only do as they required. Money paid or other value parted with, under such pressure, has never been regarded as a voluntary act within the meaning of the maxim, *volenti non fit injuria*."

In *Robertson v. Frank Bros. Co.*, 132 U. S. 17, it was held that the payment of money to a customs official, to avoid an onerous penalty, though the imposition of that penalty may have been illegal, is sufficient to make the payment an involuntary one.

The court, speaking through Mr. Justice Bradley, said:

"It was contended by the counsel for the Government at the trial, and is contended here, that the payment of the duties complained of was a voluntary payment, inasmuch as the plaintiffs themselves made the additions to the entries and invoices, and that, therefore, they cannot recover back any part of the money so paid; and they requested the court below to instruct the jury to render a verdict for the defendant. This the court refused to do; and left it to the jury to decide, upon the evidence, whether the making of the additions was a voluntary act on the part of the plaintiffs, or done under constraint in view of the penalty sure to be imposed in case it was not done."

In *Chicago, Burlington & Quincy Railroad Company v. Chicago*, 166 U. S. 226, it was held that a judgment of a State court, even if authorized by statute, whereby private property is taken for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the Constitution of the United States; and that the defendant has been deprived of property without due process of law is not entirely met by the suggestion that he had due notice of the proceedings for condemnation, appeared, and was admitted to make defence.

Demurrer overruled.

155 Circuit Court of the United States, District of Massachusetts.
In Equity.

NEWBURYPORT WATER COMPANY
v.
CITY OF NEWBURYPORT. } No. 924.

Before Colt and Brown, JJ.

Opinion of the Court, August 8, 1900.

COLT, *J.:*

Under the stipulation of counsel and order of court, the single question now presented is whether the plaintiff has been deprived of its property without due process of law in violation of the fourteenth amendment to the Constitution of the United States; all other questions as to the plaintiff's relief under its bill, including the question of valuation of the property alleged to have been taken, are to await the determination of the constitutional question.

The plaintiff, The Newburyport Water Company, was chartered by the State of Massachusetts in 1880, to supply the city of Newburyport and its inhabitants with water (Mass. St. of 1880, ch. 235). The company thereupon constructed a system of water works and proceeded to supply the city and its inhabitants with water. In 1893 the city petitioned the legislature for authority to build its own waterworks.

Notwithstanding the opposition of the company, the legislature passed the act of June 10, 1893, (Mass. St. of 1893, ch. 471)
156 authorizing the city to establish waterworks. After the vote by the city upon the acceptance of the act, the counsel for the city claimed and advised that the city had the right to supply itself and its inhabitants with water.

Thereupon, the company applied to the legislature to have the city required to purchase its waterworks before it proceeded to supply itself and its inhabitants with water. The application resulted in the passage of the act of June 14, 1894 (Mass. St. of 1894, ch. 474).

This act provided that the city should not proceed to build water works under the act of 1893 unless it should first purchase the company's property which it might do by a majority vote; and that, the city having so voted, the company should within twenty days execute and deliver to the city proper deeds conveying its property; that the property conveyed should thereupon become the property of the city, and that the city should pay to the company the fair value thereof, which if not agreed upon, should be determined by three commissioners appointed by the supreme judicial court, who should determine the fair value of the property "for the purposes of its use by said city," and "without enhancement on account of future earning capacity or good will, or on account of the franchise of said company."

The city voted to purchase; and, on January 29, 1895, the company executed and delivered to the city a duly authorized deed of all its property and franchise rights. The city took possession of the property and has ever since managed and operated it.

After the conveyance, commissioners were appointed, and on February 3, 1897, they filed in the State court their award. Questions of law arising on the award were reserved by a single justice for the full court, and on June 14, 1897, that court made an order sustaining the action of the commissioners. The commissioners estimated the value of the company's property for the purposes of its use by the city, and excluded from such valuation its future earning capacity, good will, and its right to the use of the streets and to collect water rates.

In order to sustain the contention that the plaintiff has been deprived of its property without due process of law in violation of the fourteenth amendment to the Constitution of the United States, it is necessary to show, as the plaintiff declares in its brief:

1. That the plaintiff's property was taken for public uses.

157 2. That the property was taken under color of the authority of a State.

3. That the taking was without just compensation.

The plaintiff bases the taking of its property upon the legislative threat to authorize municipal competition, whereby its deed to the city became voluntary only in form while in fact it was compulsory. This threatened competition, it is claimed, forced the plaintiff, against its will, to convey its property to the city for an insufficient consideration, and made the deed in effect a *taking* of property without just compensation under color of legislative authority.

The proposition here advanced requires a somewhat extended examination of the acts of 1893 and 1894 and their general bearing upon the single issue before us.

At the outset, it may be observed, that if the plaintiff establish a *taking* of its property, under the acts of 1893 and 1894, it is clearly right in its contention that such taking was without just compensation. The act of 1894 provided that the valuation of the property should be "the fair value of said property for the purpose of its use by said city," and "such value shall be estimated without enhance-

ment on account of future earning capacity or good will, or on account of the franchise of said company." A *taking* under an act providing such a method of compensation would be unconstitutional because without just compensation. It would be a taking "without due process of law" in violation of the fourteenth amendment.

Where private property is taken for public uses, the legislature cannot fix the compensation, or determine in what it shall consist, or prescribe the rules and principles upon which it shall be computed. Lewis on Eminent Domain, sec. 461. When a taking has been ordered, the question of compensation is judicial, not legislative. The legislature cannot extinguish any part of such compensation, or in any manner "interfere with the just powers and province of courts and juries to administer rights and justice."

It is sufficient on this point to cite the language of the Supreme Court in two cases. In *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 327, the court said:

"By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—
158 that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry. In *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 571, Mr. Justice McLean in his opinion, referring to a provision for compensation found in the charter of the Warren bridge, uses this language: 'They (the legislature) provide that the new company shall pay annually to the college, in behalf of the old one, one hundred pounds. By this provision, it appears that the legislature has undertaken to do what a jury of the country only could constitutionally do: assess the amount of compensation to which the complainants are entitled.' See also the following authorities: *Commonwealth v. Pittsburgh & Connellsville Railroad*, 58 Penn. St. 26, 50; *Penn. Railroad v. Balt. & Ohio Railroad*, 60 Maryland, 263; *Isom v. Mississippi Central Railroad*, 36 Mississippi, 300. In the last of these cases, and on page 315, will be found these observations of the court: "The right of the legislature of the State, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case, to determine what is the 'just compensation' it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent, or to extinguish any part of such 'compensation' by prospective conjectural advantage, or *in any manner* to interfere with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our

Constitution. If anything *can be* clear and undeniable, upon principles of natural justice or constitutional law, it seems that this must be so.' We are not, therefore, concluded by the declaration in the act that the franchise to collect tolls is not to be considered in estimating the sum to be paid for the property."

In *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 409, 410, the court observed:

"If the State were to seek to acquire the title to these roads, under its power of eminent domain, is there any doubt that constitutional provisions would require the payment to the corporation of just compensation, that compensation being the value of the property as it stood in the markets of the world, and not as prescribed by an act of the legislature?"

We have to ascertain then, in order to dispose of the question before us, whether there was a *taking* of the plaintiff's property (the term "property," including franchise rights) by or under the acts of 1893 and 1894.

The *taking* complained of in this case was by right of
159 eminent domain, and not under the guise of taxation or police regulation. Eminent domain "embraces all cases where, by authority of the State and for the public good, the property of the individual is taken, without his consent, for the purpose of being devoted to some particular use." Lewis on Eminent Domain, sec. 1.

Where the State grants a franchise to a corporation, and subsequently grants a similar franchise to another corporation, the question of a *taking* may be considered from three points of view. Where the first grant is not exclusive, the subsequent grant is not a taking which entitles the owner of the first franchise to compensation. Where the first grant is exclusive, the grant of a rival franchise is a taking, and just compensation must be made. Where the first grant is exclusive, the grant of a similar franchise does not constitute a taking requiring compensation, when the State, by its constitution or statute law, has reserved to itself the right to repeal, alter, or amend charters granted by the legislature. Such reservation becomes a part of the charter of every corporation. Shortly stated, the grant by the State of a competing franchise does not constitute a taking of a former non-exclusive franchise, while in the case of an exclusive franchise it does constitute a taking in the absence of a reserve power in the State. *Charles River Bridge v. Warren Bridge*, 7 Pick. 344; affirmed 11 Pet. 420; *Hamilton Gas Company v. Hamilton*, 37 Fed. Rep. 832; affirmed, 146 U. S. 258; *Greenwood v. Freight Company*, 105 U. S. 13; *Binghampton Bridge*, 3 Wall. 51; *Tomlinson v. Jessup*, 15 Wall. 454; *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *Souix City Street R'y Co. v. Sioux City*, 138 U. S. 98; *Louisville Water Company v. Clark*, 143 U. S. 1; *Schurz v. Cook*, 148 U. S. 397, 410; *New York and New England R. R. v. Bristol*, 151 U. S. 556, 567; *Covington v. Kentucky*, 173 U. S. 231; *Metropolitan R. R. Co. v. Highland Railway*, 118 Mass. 290, 293; *Thornton v. Marginal Freight Railway*, 123 Mass. 32; *Piscataqua Bridge v. New Hampshire Bridge*,

7 N. H. 35; *Boston and Lowell R. R. v. Salem and Lowell R. R. Co.*, 2 Gray, 1; *Power v. Village of Athens*, 99 N. Y. 592.

The act of 1893 authorized the city to supply itself and its inhabitants with water, provided, if the company so desired, the city should first vote upon the proposition to purchase the company's works. The city voted not to purchase, and did vote to ac-
160 cept the provisions of the act. The franchise rights granted to the company by its charter were not exclusive. This is not disputed. We have then presented the question, whether the subsequent grant to the city of the right to build competing waterworks constituted a *taking* of the plaintiff's property or franchise. It is the settled law of this country, established by the decisions of the Federal and State courts, that such a grant is not a *taking* of a former franchise giving any right to compensation. "Where the grant is not by its terms exclusive, the legislature is not precluded from granting a similar franchise or erecting a rival way or structure, the result of which may be to greatly impair or even totally destroy the value of the former grant, and such damage is not a *taking* of the former franchise which entitles its owner to compensation." This principle was settled in the leading case of *Charles River Bridge v. Warren Bridge*, and has been confirmed by numerous decisions." Lewis on Eminent Domain, sec. 136.

In the case of *Charles River Bridge v. Warren Bridge*, 7 Pick. 344, the supreme court of Massachusetts held that the grant by the legislature of a competing franchise did not divest vested rights or impair the obligation of a contract.

On appeal (11 Pet. 420), the Supreme Court of the United States placed its decision on the latter ground. This was before the passage of the fourteenth amendment, so that the only Federal constitutional right involved related to contract.

In *Hamilton Gas Light Co. v. City of Hamilton*, 37 Fed. Rep. 832, 836, where a municipality was proceeding to construct competing gas works under a State statute, the point was taken that the statute interfered with vested rights, and impaired, if it did not destroy, the property of the company, and was in effect an appropriation of private property to public use without making compensation, in violation of the fourteenth amendment to the Constitution of the United States. The court decided against this contention.

In the Supreme Court, on appeal (146 U. S. 258), as appears from the statement of the case by the court on page 259, the plaintiff invoked the protection of the contract clause of the Constitution, as well as the clause that no State shall deprive any person of property without due process of law. The court, in its opinion, affirming the judgment below, only discusses the question whether there was any impairment of the obligation of a contract, and by im-
161 plication, at least (for the point was necessarily involved in the decision), held that the claim that the plaintiff was deprived of its property without due process of law was so untenable as a legal proposition as not to require discussion.

It may be said that since the decision in *Charles River Bridge v.*

Warren Bridge, the Supreme Court and other courts in this country have recognized the law as settled, that where the State grants a franchise, which is not by express terms made exclusive, the subsequent grant of a similar and competing franchise impairs no constitutional right; that it is neither a violation of the obligation of a contract, nor an impairment of vested rights, nor a taking of property without just compensation.

In *Fort Plain Bridge Company v. Smith*, 30 N. Y. 44, 61, the court observed:

"Since the case of *The Charles River Bridge v. The Warren Bridge* (11 Peters 420), it has been understood to be the law that it is competent for the legislature, after granting a franchise to one person or corporation, which affects the rights of the public, to grant a similar franchise to another person or corporation, the use of which shall impair or even destroy the value of the first franchise, although the right so to do may not be reserved in the first grant; unless the right so to do is expressly prohibited by the first grant."

In The *Salem and Hamburgh Turnpike Company v. Lyme*, 18 Conn. 451, 457, the court said:

"Since the decision of this court in the case of *The Enfield Toll Bridge Company v. The Hartford and New Haven Railroad Company*, 17 Conn. R. 454, and of the Supreme Court of the United States in the case of *The Charles River Bridge v. The Warren Bridge*, 11 Peters, 420, and the numerous decisions to the same effect, cited in those cases, we do not think it an open question, whether a new road, canal, or bridge, materially diverting travel or business from an old one under a prior charter, is therefore unconstitutional, or to be suppressed."

In The *Lafayette Plankroad Company v. The New Albany & Salem Railroad Company*, 13 Ind. 90, 92, the court declared:

"The grant of a charter for a road, a bridge, or a ferry, does not estop the legislature from granting a subsequent charter for a road, bridge, or ferry, which may compete with the former in the transportation of freight and passengers between given points; and the simple fact that the two run parallel, and mutually diminish the business of each other, is no ground for a claim by either for damages."

162 Although the Supreme Court, in those cases where the exercise of this power by or under the State has been disputed, has usually confined the discussion of the alleged violation of constitutional rights to the contract clause, the language of the court in those cases is instructive, and has an important bearing on the specific question under consideration. In *Lehigh Water Company v. Easton*, 121 U. S. 388, 390, the court said:

"By constructing waterworks of its own, the borough will not destroy the franchises of the plaintiff company. It may impair their value, and probably will do so; but of this the company have no legal cause of complaint. The granting of a new charter to a new corporation may sometimes render valueless the franchises of an existing corporation; but unless the State by contract has precluded

itself from such new grant the incidental injury can constitute no obstacle."

In *Stein v. Bienville Water Co.*, 141 U. S. 67, 81, the court said:

"Guided by this rule, in respect to which there is no difference of opinion in the courts of this country, we are forbidden to hold that a grant under legislative authority, of an exclusive privilege, for a term of years, of supplying a municipal corporation and its people with water drawn by means of a system of water works from a particular stream or river, prevents the State from granting to other persons the privilege of supplying, during the same period, the same corporation and people with water drawn in like manner from a different stream or river."

In *Hamilton Gas Co. v. Hamilton*, 146 U. S. 258, the company maintained that its charter was exclusive. The city was proceeding to build works of its own, claiming statutory authority therefor. As we have already observed, the company in that case contended that this was an impairment of its charter, and a taking of its property without due process of law.

The court observed at page 268:

"It may be that the erection and maintenance of gas-works by the city at the public expense, and in competition with the plaintiff, will ultimately impair, if not destroy, the value of the plaintiff's works for the purposes for which they were established. But such considerations cannot control the determination of the legal rights of the parties."

In *Pearsall v. Great Northern Railway*, 161 U. S. 646, 664, the court said:

"An exclusive right to enjoy a certain franchise is never presumed, and unless the charter contain words of exclusion, it is no im-
163 pairment of the grant to permit another to do the same thing, although the value of the franchise to the first grantee may be wholly destroyed. This principle was laid down at an early day in the case of the *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, and has been steadily adhered to ever since."

Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, was an appeal from the New York court of appeals. The court (p. 696) said:

"The court of appeals held that neither the statute under which the company was organized, nor the contract, nor the act of annexation, gave to the company rights exclusive and beyond the reach of legislative action. These conclusions of the court of appeals are vigorously challenged in the argument, but we are of opinion that they are correct. The statute simply provided for the organization of water companies. The contract in terms contained no words of exclusion. It gave to the company the privilege of laying its mains in the streets of the town, and contained a covenant on the part of the town to pay certain hydrant rentals. But grants from the public are strictly construed in favor of the public, and grants of a privilege are not ordinarily to be taken as grants of an exclusive privilege."

As the franchise granted to the plaintiff by its charter was not

exclusive, the subsequent grant by the act of 1893 giving the city authority to construct independent and competing waterworks was not a violation of the plaintiff's charter, or of any constitutional right.

In establishing the power of the legislature to grant a competing franchise, the conflict has been between the rightful claims of the public and the protection secured to private property by constitutional provisions. Before the case of *Charles River Bridge v. Warren Bridge* (1837), many eminent judges and lawyers were of the opinion that such legislation impaired vested rights of property and violated the contract between the State and the corporation secured by charter. In that case, however, it was successfully urged, though the court were divided in opinion, that the grant by the sovereign authority of a franchise to build a bridge over a public water-way, and to collect tolls, did not prohibit the grant of another franchise to construct a bridge over the same water-way which was free to the public, though the effect was to impair, or even destroy, the value of the first grant. Whatever doubt may have formerly existed as to this power of the legislature, and however cogent and just the argument may be against its exercise in a particular case, the right of the legislature to exercise it in any case cannot now be
164 questioned; and when a franchise is now obtained for the purpose of establishing waterworks, or to promote like enterprises in which the public are interested, and capital is invested, it should not be upon the assumption or belief that the town or city will refrain from competition and the legislature will refuse to authorize it. On the contrary, this legislative power having been upheld and enforced for so many years it may well be presumed that when a franchise is obtained which is not exclusive, it is taken with the knowledge and risk that the legislature is not precluded from granting, at any moment, a similar and competing franchise.

Before examining the act of 1894, it may be well to call attention to some preliminary considerations. The plaintiff contends that the *taking* in this case was wholly under the act of 1894, and that the act of 1893 never took effect, because the "vote to purchase" the company's works, under section 12 of the act, was a condition precedent to the city's right to vote to supply itself and its inhabitants with water under section 13; and the city having voted not to purchase, the act failed, and, consequently, the subsequent vote by the city to accept the provisions of the act was nugatory. This construction seems contrary to the intent and purpose of the act. The natural and reasonable construction of sections 12 and 13, looking at the whole act, is that the city should first decide whether it would purchase the plaintiff's works before determining whether it would build works of its own. For the purpose of our present inquiry, however, it is unnecessary to pass upon this question. If the act of 1893 were in force, as contended by the defendant, there was, as we have seen, no *taking* of the plaintiff's property under it. If it were not in force, there surely was no such taking. But whether legally in force or not, it clearly appears that it was the fear or belief of the

company, the city, and the legislature, that the act of 1893 was operative which led to the passage of the act of 1894.

After the vote by the city accepting the act of 1893, the company petitioned the legislature that the city should buy its property and franchise before proceeding to build waterworks under the act. Accompanying this petition was a proposed bill, which provided that the city should, "before proceeding to supply itself and its inhabitants with water under the authority of chapter four hundred and seventy-one of the Acts of the Year One thousand eight hundred and ninety-three, purchase from the Newburyport Water
165 Company the franchise, corporate property, and all the rights and privileges of said Newburyport Water Company." It further provided that the compensation to be paid by the city should be determined by three commissioners appointed by the supreme judicial court.

Thereupon, the legislature passed the act of 1894, obliging the city to purchase the plaintiff's works before proceeding to supply itself and its inhabitants with water under the act of 1893, and at the same time fixing the measure of compensation to be paid by the city.

Section 1 declares:

"If, within thirty days after the passage of this act, the Newburyport Water Company shall notify the mayor of the city of Newburyport in writing that it desires to sell to said city all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water, said city shall not proceed to supply water to itself or its inhabitants, under the authority of chapter four hundred and seventy one of the Acts of the Year Eighteen hundred and ninety-three, unless it shall have first purchased of said company the property aforesaid; and said company is authorized to make sale of said property to said city, and said city is authorized to purchase the same."

The act then provides that whenever the city shall vote to purchase said property, "notice of the desire of said company to sell the same having been given as hereinbefore provided," the company shall within twenty days convey by deed its property to the city, and the city shall pay "the fair value thereof to be ascertained as hereinafter provided." If the parties are unable to agree upon the value of the property, commissioners are to be appointed "who shall determine the fair value of said property for the purposes of its use by said city, and whose award, when accepted by the court, shall be final. Such value shall be estimated without enhancement on account of future earning capacity or good will, or on account of the franchise of said company." Section 4 of the act declares:

"In case said city shall, in violation of section one of this act, proceed to supply itself or its inhabitants with water before making the purchase aforesaid, the supreme judicial court shall, upon peti-

tion of said company, have jurisdiction in equity to enjoin said city from so doing until it shall have made such purchase."

Before the consideration of what the plaintiff claims was the legal effect of this act let us refer for a moment to its manifest
166 purpose. Recognizing the act of 1893 as in force, it simply prohibits the city from exercising the right to build waterworks under that act if the plaintiff desires to sell its works to the city upon the terms provided. There is certainly nothing on the face of the act which authorizes the taking of the plaintiff's property without its consent. It does not in terms compel the company to sell its property to the city. On the contrary, it expressly declares that the company may do so if it "desires."

If the act provide for a voluntary conveyance, the insufficiency of the consideration prescribed has no bearing on the issue before us. The question of compensation becomes material only in the event that the sale under the act was made without the plaintiff's consent. If this does not appear, there is no violation of the constitutional right now invoked, whatever other relief the plaintiff may be entitled to.

The great injury which at this time threatened the company's property was municipal competition under the act of 1893, and the act of 1894 was passed as a protection against such impending disaster. The legislature might have provided in that act, and there is much force in the contention that in justice and equity it ought to have provided, that the plaintiff should receive full compensation for its property purchased by the city, but the failure of the legislature to make such provision cannot change the nature and scope of a statute which authorized a voluntary sale into a statute which authorized the taking of the plaintiff's property without its consent by right of eminent domain.

We will now consider more directly and specifically the general argument advanced by the plaintiff to establish a *taking* of its property without just compensation. This argument may be summarized as follows:

The act of 1893 never took effect and was void except so far as it was re-enacted in the act of 1894; the act of 1894 was in effect a threat by the State that it would authorize the city to build competing waterworks and so ruin the company, unless it consented to convey its property to the city without just compensation; that in consequence of such threat the company conveyed its property to the city; that by reason of such threat the deed of conveyance though voluntary in form was in fact compulsory; that
167 such compulsion constituted duress and made the conveyance a *taking;* that such taking was plainly without just compensation by the terms of the act. Stated in another form the proposition is that a threatened lawful grant by the State to *B* of a franchise similar to one already granted to *A* is an exercise of unlawful compulsion on the part of the sovereign authority, and that a voluntary conveyance of property under a statute containing such a threat, and not providing for full compensation, is voluntary only

in form, while in fact it is made under duress; that, consequently, such a statute in effect authorized a *taking* of property without just compensation in violation of a constitutional right.

The plaintiff's contention is founded upon the hypothesis that the right of the city to build competing waterworks under the act of 1893 did not exist when the act of 1894 was passed. If, however, the act of 1893 was in force at that time, as we are inclined to hold, then the State threatened nothing by the act of 1894 because it had already authorized municipal competition. In that case we are confronted with this question, whether, the city having the right to compete, it was lawful for the legislature to pass the act of 1894 forbidding the city so to do, providing the company chose to sell on terms which did not award full compensation for its property. But it can hardly be seriously urged that when the company was met by legal competition which meant ruin, it was unlawful for the legislature to pass an act which at least made the situation less disastrous, and providing at the same time that the company need not avail itself of the act unless it saw fit.

Nor is the situation any different in principle if we assume that the act of 1893 was void, and that we have only to consider the act of 1894. The only difference is that in one case the legislature had authorized legal competition, and in the other, as it is claimed, it threatened to authorize legal competition. But if competition be lawful, threatened competition is lawful. And if it were lawful for the State to authorize municipal competition, it was not unlawful for it to threaten to authorize municipal competition.

But it is urged, and this is the crucial point in the plaintiff's argument, that the threat of competition produced compulsion which amounted to duress, and, consequently, made the sale by the company to the city not a voluntary but a compulsory act, and being compulsory its effect was a *taking* of the plaintiff's property
168 without just compensation. The plaintiff's whole position hinges on the question of compulsion.

In approaching this question it may be observed that there was a greater degree of compulsion on the part of the State if we assume the act of 1893 was operative than if we assume it was void. In the former case municipal competition had actually been authorized, while in the latter case it was only threatened.

But what was the compulsion in this case? It was the compulsion arising from the fear of competition produced by what is termed the threat of the State to authorize municipal competition. If a person apprehensive of competition sells his property for less than its fair value, it cannot be said that in law the sale was voluntary in form only, and in fact compulsory. In a certain sense, such a sale is compulsory. It is, however, a kind of compulsion which will always exist so long as competition exists. But this is not the kind of compulsion that amounts in law to duress because it lacks the essential ingredient of duress, namely, illegality. It is unlawful compulsion which constitutes duress. "Duress exists," says Judge Cooley, "when one, by the unlawful act of another, is induced to make a

contract or perform some act under circumstances which deprive him of the exercise of free will." *Hackley v. Headley*, 45 Mich. 569, 574. Duress by the Government or its officers, in this class of cases, is defined by the Supreme Court as "moral duress not justified by law." *Maxwell v. Griswold*, 10 How. 242, 256. It must be the pressure arising from unlawful acts or demands on the part of the Government or its officers to produce that constraint of will or action, or state of necessity or compulsion, which render acts voluntary in form, involuntary and void. In this class of cases the test is, was the cause of the compulsion lawful or unlawful. If the compulsion be founded on lawful competition, or the threat of lawful competition there is no element of illegality about it. Such compulsion is justified by law.

The whole question of compulsion or duress in this case turns upon whether municipal competition, actual or threatened, under the authority of the State, was justified by law. If it were, as we have shown, then the deed to the city was not given under unlawful compulsion or duress, but was voluntary in fact and in law. On the other hand, it may be said, that if it had been unlawful for the State to authorize municipal competition, then the threat so to do might have been held to have amounted to duress not justified by law,
169 and, consequently, the deed of the plaintiff's property to have been in effect a *taking* without just compensation under the authority of the State.

In the Supreme Court cases relied on by the plaintiff it will be found that the compulsion or duress was based upon an illegal act or exaction, or threatened illegal act or exaction, by the Government or its officers.

United States v. Tingey, 5 Pet. 115, 129, was a suit brought by the Government upon a bond, variant from that prescribed by law, demanded of a public officer upon the peril of losing his office. Mr. Justice Story, delivering the opinion of the court, said:

"The substance of this plea is, that the bond, with the above condition, variant from that prescribed by law, was, under color of office, extorted from Deblois and his sureties, contrary to the statute, by the then Secretary of the Navy, as the condition of his remaining in the office of purser, and receiving its emoluments. There is no pretence then to say, that it was a bond voluntarily given, or that, though different from the form prescribed by the statute, it was received and executed without objection. It was demanded of the party, upon the peril of losing his office; it was extorted under color of office, against the requisitions of the statute. It was plainly, then, an illegal bond; for no officer of the Government has a right, by color of his office, to require from any subordinate officer, as a condition of holding office, that he should execute a bond with a condition different from that prescribed by law; that would be, not to execute, but to supersede, the requisitions of law; it would be very different, where such a bond was, by mistake or otherwise, voluntarily substituted by the parties for the statute bond, without any coercion or extortion by color of office."

Maxwell v. Griswold, 10 How. 242, was a case where an appraisement of imported goods was erroneously made as to the point of time of the valuation, and the importer paid the consequent excess of duties. The Government contended that this was voluntary. The court (p. 256) said:

"But this addition and consequent payment of the higher duties were so far from voluntary in him, that he accompanied them with remonstrances against being thus coerced to do the act in order to escape a greater evil, and accompanied the payment with a protest against the legality of the course pursued towards him.

Now, it can hardly be meant in this class of cases, that, to make a payment involuntary, it should be by actual violence, or any physical duress. It suffices, if the payment is caused on the one part by an illegal demand, and made on the other part reluctantly and in consequence of that illegality, and without being able to regain possession of his property except by submitting to the payment.

170 All these requisites existed here. We have already decided, that the demand for such an increased appraisal was illegal. The appraisal itself, as made, was illegal. The raising of the invoice was thus caused by these illegalities in order to escape a greater burden in the penalty. The payment of the increased duties thus caused was wrongfully imposed on the importer, and was submitted to merely as a choice of evils.

He was unwilling to pay either the excess of duties or the penalty, and must be considered, therefore, as forced into one or the other by the collector, *colore officii*, through the invalid and illegal course pursued in having the appraisal made of the value at the wrong period, however well meant may have been the views of the collector.

The money was thus obtained by a moral duress, not justified by law, and which was not submitted to by the importer, except to regain possession of his property withheld from him on grounds manifestly wrong."

In *Swift Company v. United States*, 111 U. S. 22, 28, the plaintiffs, who were manufacturers of matches and furnished their own dies for the stamps used by them, and were thereby entitled to a commission of ten per cent. in money on the price of the stamps, accepted for a long period their commissions in stamps because the Treasury Department would pay in no other manner. The court held that the apprehension of being stopped in their business by this illegal exaction was a sufficient moral duress to make their payments involuntary. Mr. Justice Matthews, delivering the opinion of the court, said:

"The question is, whether the receipts, agreements, accounts, and settlements made in pursuance of that demand and necessity, were voluntary in such sense as to preclude the appellant from subsequently insisting on its statutory right. We cannot hesitate to answer that question in the negative. The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction, or discontinue its business. It

was in the power of the officers of the law, and could only do as they required. Money paid or other value parted with, under such pressure, has never been regarded as a voluntary act within the meaning of the maxim, *volenti non fit injuria.*"

In support of the position taken, the court (p. 29) referred to numerous cases:

"In *Close v. Phipps*, 7 M. & Gr. 586, which was a case of money paid in excess of what was due in order to prevent a threatened sale of mortgaged property, Tindal, C. J., said: 'The interest of the plaintiff to prevent the sale, by submitting to the demand, was so great, that it may well be said the payment was made under
171 what the law calls a species of duress.' And in *Parker v. Great Western Railway Company*, 7 M. & Gr. 253, the wholesome principle was recognized that payments made to a common carrier to induce it to do what by law, without them, it was bound to do, were not voluntary, and might be recovered back. Illegal interest, paid as a condition to redeem a pawn, was held in *Astley v. Reynolds*, 2 Stra. 915, to be a payment by compulsion. This case was followed, after a satisfactory review of the authorities, in *Tutt v. Ide*, 3 Blatchf. 249; and in *Ogden v. Maxwell*, 3 Blatchf. 319, it was held that illegal fees exacted by a collector, though sanctioned by a long continued usage and practice in the office, under a mistaken construction of the statute, even when paid without protest, might be recovered back, on the ground that the payment was compulsory and not voluntary."

The court then cites *Maxwell v. Griswold*, 10 How. 242, and other cases.

In *Robertson v. Frank Brothers Company*, 132 U. S. 17, a customs official proceeded in his appraisement upon a wrong principle contrary to law, and it was held that the compulsory insertion, under threat of an onerous penalty, by the importer of such additional charges upon the entry and invoice, which necessity involved the payment of increased duties, makes the payment of those duties involuntary.

In delivering the opinion of the court, Mr. Justice Bradley (p. 24) said:

"In our judgment the payment of money to an official, as in the present case, to avoid an onerous penalty, though the imposition of that penalty might have been illegal, was sufficient to make the payment an involuntary one. It is true that the thing done under compulsion in this case was the insertion of the additional charges upon the entries and invoices; but that necessarily involved the payment of the increased duties caused thereby, and in effect amounts to the same thing as an involuntary payment."

Mr. Justice Bradley in that opinion refers to the language of the decisions in *Maxwell v. Griswold*, and *Swift Company v. United States* which we have cited, and in speaking of the former case he declares that "the ultimate fact was the moral duress not justified by law."

In the above cases, which are cited by the plaintiff, it is seen that it is the element of illegality which lies at the foundation of this

species of duress. In those cases the moral duress was caused by the illegal acts or demands of the Government or its officers. In the case at bar there was no moral duress not justified by law, because it was lawful for the State to authorize, or threaten to author-
172 ize, municipal competition. There would have been a close analogy between those cases and the present, if the plaintiff had possessed an exclusive franchise, and the legislature had, contrary to law, authorized, or threatened to authorize, municipal competition. In that event it might have been claimed that the company was compelled to convey its property to the city under an unlawful exercise of legislative power, and, therefore, under moral duress not justified by law.

The plaintiff argues that the measure of compensation provided by the act of 1894 was not justified by law, and that, consequently, the principle recognized in the above cases is applicable to the present case. But this is an attempt to connect things that are entirely distinct. The compensation to be paid for the plaintiff's property has nothing to do with the subject of duress. It was not the want of just compensation, but the threat of municipal competition, which was the cause of the alleged duress. To connect the alleged duress with the lack of compensation involves the proposition that the compulsion which forced the plaintiff to deed its property to the city was owing to the unlawful compensation provided by the act of 1894, and not to the threatened competition by the city. The want of just compensation has no bearing on the question before us unless the plaintiff first establishes a duress not justified by law.

And this brings us to the decisive point on the issue under consideration, and the conclusion we have reached.

We hold, for the reasons already given, that the grant of a competing franchise to the city in this case was a lawful exercise of legislative power, and that the threatened grant of such a franchise under the act of 1894 (admitting this to be the effect of the act) was a lawful exercise of legislative power, and that, being lawful, it could not in either case have the legal effect of making a voluntary conveyance of the plaintiff's property, compulsory and void, and that, consequently, the plaintiff has failed to establish a *taking* of its property without just compensation under the authority of the State.

Upon the single question submitted for our determination, and without passing on any other question concerning the plaintiff's relief under the bill, we are of opinion, after careful consideration, that the plaintiff has not been deprived of its property without due process of law in violation of the fourteenth amendment to the Constitution of the United States, and a decree may be drawn accordingly.

173 Circuit Court of the United States, District of Massachusetts.
In Equity.

NEWBURYPORT WATER COMPANY
v.
CITY OF NEWBURYPORT. } No. 924.

Before Colt and Brown, JJ.

Opinion, March 5, 1902.

Per curiam (as amended): It has been decided by this court, upon full and careful consideration, that there was no taking of the complainant's property under the acts of 1893 and 1894; that the deed of the complainant's property was voluntary, and not compulsory; and that, consequently, the complainant had not been deprived of its property without due process of law, in violation of the fourteenth amendment to the Constitution of the United States. The complainant now maintains that the act of 1894 was in violation of section 10 of article 1 of the Constitution, which provides that "No State shall pass any law impairing the obligation of contracts." The complainant raises this question by asking the court to admit the testimony of the commissioners appointed to value the complainant's property under the act of 1894 to the effect that they did not
174 in fact value the water contract entered into between the complainant and defendant.

The act of 1893 authorizes municipal competition, which the legislature had legal right to authorize. The act of 1894 forbids municipal competition, provided the complainant chose to deed its property to the defendant on the terms specified. This act did not impair any contract which had been entered into between the complainant and defendant. It simply gave the complainant the option if it chose, to sell its property to the defendant on the terms mentioned. The complainant, if it so desired, could have retained its property and its contract with the defendant; but it did not do so, and voluntarily deeded its property to the defendant. If it lost any right to any contract by this action, it was because it deemed it wise to take advantage of the provisions of the act of 1894, which obliged the defendant to buy the water works, if the complainant so desired, before it should undertake to build water works of its own.

Assuming that this testimony could properly be offered at this stage of the case (a question which we do not find it necessary to pass upon), and that the complainant could show that the commissioners did not in fact value the water contract in estimating the value of the complainant's property, we are of the opinion that this testimony would not be material and that it would be entirely ineffectual. It does not tend to prove that the act of 1894 was in violation of the contract clause of the Constitution, because what was

done or omitted by commissioners appointed under the act could not effect the terms of the legislative act itself or make the act unconstitutional. Furthermore, after a full hearing upon the
175 question of duress, this court has already decided that all the proceedings which took place under the act of 1894 were entered into voluntarily by the complainant in order to avoid great disaster arising from municipal competition.

Our conclusion upon this point is conclusive against the admission of the testimony offered by the plaintiff, that the commissioners did not value the water contract.

The motion to enter the final decree dismissing the bill is granted.

176 Circuit Court of the United States, District of Massachusetts.
In Equity.

NEWBURYPORT WATER COMPANY
v.
CITY OF NEWBURYPORT. } No. 924.

Lauriston L. Scaife, Robert M. Morse, for complainant.
A. E. Pillsbury, specially, C. C. Dame, for defendant.

Docket Entries.

May T., 1897, July 21.—Bill filed, subpœna issued, returnable Sept. rules, to wit: Sept. 7, 1897.
July 21.—Affidavits of McCusker, Norman, Noyes, Piper, Jones, Mudge & Major, and certified copy opinion of supreme judicial court, filed.
July 21.—Colt, J. Summons issued, returnable July 24, 1897, at 10.30.
July 23.—Hearing postponed by agreement.
Sept. 1.—Amendment to bill filed.
Sept. 9.—Motion to dismiss bill for want of jurisdiction filed.
Sept. 13.—Colt, J. Heard on motion to dismiss and motion denied.

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May T., 1897, Sept. 27.—Demurrer filed.
Oct. 14.—Affidavit of Charles C. Dame filed.
Oct. 14.—Motion to strike affidavits of Major, Jones and Mudge from files filed.
Oct. 14.—Affidavit of John E. McCusker filed.
Oct. T., 1897, Oct. 15.—Copy agreed facts in Moore *et al. v.* Sanford *et al.* filed.
Heard before Colt, J. Oct. 23, 25 and 30.
Feb. 24.—Colt, J. Opinion filed,—demurrer overruled.
Mar. 22.—Claim of appeal filed by defendant.

Apr. 1.—Agreement as to time for filing answer filed.
Apr. 14.—Petition for rehearing on demurrer filed.
Apr. 14.—Answer filed.
Apr. 20.—Stipulation as to time for filing exceptions to answer filed.
May 9.—Exceptions to answer filed.
May T., 1898, June 27.—Brief for complainant filed.
Oct. T., 1898, Nov. 17.—Colt, J. Petition for rehearing denied.
Nov. 17.—Special demurrer received.

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Oct. T., 1898, Dec. 31.—Colt, J. Amendment of seventh prayer of bill allowed in open court by consent of court and of all parties, by transposing terms plaintiff and defendant in sixth line of page twenty-one of printed record.
Dec. 31.—Heard on motion for leave to file special demurrer before Colt, J.
Jan. 7.—Colt, J. Rescript filed, motion denied.
May T., 1899, June 10.—Stipulation filed.
June 15.—Replication filed.
" " —Agreement that exceptions to defendant's answer may be withdrawn, &c., filed.
June 20.—Colt, J. Order of court as to hearing by consent—order in files.
June 22.—Agreement filed.
Heard before Colt and Brown, JJ. pursuant to stipulation and order of court, June 28, 29 and 30.
Briefs filed.
May T., 1900, Aug. 8.—Colt & Brown, JJ. Opinion filed; decree to be entered pursuant to opinion.
Oct. T., 1900, Jan. 10.—Proposed final decree submitted by defendant.
Jan. 10.—Colt and Brown, JJ. Benj. H. Bradlee appointed special examiner.
Mar. 22.—Stipulation filed.

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May T., 1901, May 22.—Motion for final decree filed.
May 22.—Heard before Colt & Brown, JJ. on questions raised by stipulation filed March 22, 1901.
May 27.—Briefs filed.
Oct T., 1901, Jan. 21.—Colt & Brown, JJ. Opinion *per curiam* "the motion to reopen the case is denied; and the motion to enter a final decree dismissing the bill is granted."

Mar. 5.—Colt & Brown, JJ. Ordered that second docket entry of May 22, 1901, be amended so as to read as follows: "May 22 Heard before Colt and Brown, JJ. on questions raised by stipulation filed March 22, 1901; it being orally agreed that said hearing shall be also a final hearing in the case."

Mar. 5.—Ordered further that the opinion *per curiam* filed Jan. 21, 1902, be amended and the docket entry of that date vacated.

Mar. 5.—Amended opinion *per curiam* filed.

Mar. 5.—Motion for final decree granted.

Mar. 5.—Final decree, bill dismissed with costs—decree in files.

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Oct. T., 1902, Dec. 8.—Claim of appeal filed.

" " —Assignment of errors filed.

" " —Colt, J. Bond approved and filed.

" 8.—Colt, J. Appeal allowed, citation issued returnable Jan. 5, 1903.

181 *Claim of Appeal.*

(Filed Dec. 8, 1902.)

The above named plaintiff, Newburyport Water Company, considering itself aggrieved by the order and decree entered March 5, 1902, in the above entitled proceedings, doth hereby appeal from said decree to the Supreme Court of the United States; and prays that this its appeal may be allowed, and that the transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

ROBERT M. MORSE,
LAURISTON L. SCAIFE,
Counsel for Plaintiff.

182 *Assignment of Errors.*

(Filed Dec. 8, 1902.)

Comes now The Newburyport Water Company, appellant, (the plaintiff in the court below,) and says that there is manifest error in the records and proceedings of the circuit court of the United States for the district of Massachusetts in this suit as follows:

I.

The court erred in this:
That it held, adjudged and decreed that the plaintiff has not been

deprived of its property without due process of law in violation of the fourteenth amendment to the Constitution of the United States.

II.

The court erred in this:

That it held that the plaintiff failed to establish a taking of its property without just compensation under the authority of the State.

III.

The court erred in this:

That, although it held that the sale of the company's property was compulsory in fact, it held that such sale was not compulsory in law.

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IV.

The court erred in this:

That it did not hold that the act of 1894 (including the act of 1893 as re-enacted by the act of 1894,) was compulsory in law as well as in fact, and constituted duress.

The said act of 1894 is chapter 474 of the Massachusetts Acts of 1894; and the said act of 1893 is chapter 471 of the Massachusetts Acts of 1893.

V.

The court erred in this:

That it held "that the threatened grant of such a franchise under the act of 1894 (admitting this to be the effect of the act) was a lawful exercise of legislative power."

VI.

The court erred in this:

That it did not find and hold that the act of 1894, (including the act of 1893 as re-enacted by said act of 1894) as construed by the highest court of Massachusetts in effect authorized a taking of plaintiff's property without just compensation; and that thereby and thereunder the State of Massachusetts deprived plaintiff of its property without just compensation in violation of the provision of the fourteenth amendment to the Constitution of the United States.

184 The said act of 1894 is chapter 474 of the Massachusetts Acts of 1894; and the said act of 1893 is chapter 471 of the Massachusetts Acts of 1893.

VII.

The court erred in this:

That it adjudged and decreed that the obligation of no contract of the plaintiff has been impaired in violation of the contract clause of the Constitution of the United States, to wit, section 10 of article I of the Constitution of the United States.

VIII.

The court erred in this:

That it excluded the testimony offered by plaintiff to the effect that the commissioners appointed by the State court to value complainant's property under the act of 1894 did not in fact value the water contract entered into between the complainant and defendant. The testimony so offered and rejected was offered under a stipulation between the plaintiff and defendant, which is set forth in the record in the circuit court at page 125 *et seq.*, and the testimony so offered and excluded is stated therein as follows:

"It is hereby agreed, if in the opinion of the court the testimony of the commissioners below referred to is competent evidence, is admissible at this stage of the case, and is material, that the commissioners appointed under Mass. St. of 1893, chap. 471, sect. 12, to value the property of the plaintiff company, if called as witnesses in this cause, would testify, without contradiction, that they did not in fact value as part of said property the contract between the company and the city, of which a copy marked 'Exhibit D' is an- to the
185 plaintiff's bill, it being their opinion that the same in law could not be valued; and it is also agreed that the same shall be dealt with in like manner as if said commissioners had so testified before the commissioner appointed by the court in this case, and as if said objections as to competency, materiality, and admissibility at this stage of the case had been duly taken before such commissioner and reserved for the consideration of the court; and it is also agreed that the petitioner at the hearing put the contract in evidence under objection."

IX.

The court erred in this:

That it did not hold, adjudge and decree that the said act of 1894 (including said act of 1893 as re-enacted by said act of 1894), as construed and applied by the highest court of the State of Massachusetts, impaired and impairs the obligation of contracts belonging to plaintiff in violation of section 10 of article I of the Constitution of the United States under the plaintiff's rights thereunder.

X.

The court erred in this:

That it ordered, adjudged and decreed that plaintiff's bill be dismissed with costs to the defendant.

XI.

The court erred in this:

That it did not adjudge and decree that plaintiff is entitled to relief.

186 Wherefore the said Newburyport Water Company, appellant, prays the honorable court to examine and correct the

errors assigned, and for a reversal of the decree of the said circuit court entered in the above entitled cause.

NEWBURYPORT WATER COMPANY,
By ROBERT M. MORSE.
LAURISTON L. SCAIFE,
Counsel.

LAURISTON L. SCAIFE,
Solicitor for Newburyport Water Company.

187 *Bond to Party on Appeal.*

(Filed and approved Dec. 8, 1902.)

Know all men by these presents, that we, The Newburyport Water Company, of Massachusetts, as principal, and George H. Norman and Frank G. Webster, as sureties, are held and firmly bound unto the City of Newburyport of Massachusetts, in the full and just sum of five hundred dollars to be paid to the said City of Newburyport, its certain attorney, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this second day of December, in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a circuit court of the United States for the district of Massachusetts, in a suit in equity depending in said court between said Newburyport Water Company, plaintiff, and said City of Newburyport, defendant, a decree was entered against the said Newburyport Water Company and the said Newburyport Water Company having obtained an appeal to remove said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said City of Newburyport citing and admonishing it to be and appear in the said Supreme Court of the United States at Washington on the fifth day of January, A. D. 1903.

Now, the condition of the above obligation is such, that if the said Newburyport Water Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its appeal good, then the above obligation to be void; else to remain in full force and virtue.

NEWBURYPORT WATER COMPANY, [SEAL.]
By GEORGE H. NORMAN.
GEORGE H. NORMAN. [SEAL.]
FRANK G. WEBSTER. [SEAL.]

Sealed and delivered in presence of
CHARLES E. COWAN,
As to N. W. Co. and G. H. N.
W. ENDICOTT, JR.,
To F. G. W.

Approved:
LE BARON B. COLT,
Circuit Judge.

188 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the City of Newburyport, a municipal corporation duly established under the laws of the Commonwealth of Massachusetts and located in the county of Essex, in said Commonwealth, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington, D. C., on the fifth day of January next, pursuant to an appeal duly obtained from a decree of the circuit court of the United States for the district of Massachusetts wherein The Newburyport Water Company, a corporation duly established under the laws of the Commonwealth of Massachusetts, and located therein, is appellant and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Le Baron B. Colt, judge of the circuit court of the United States for the district of Massachusetts, this eighth day of December, in the year of our Lord one thousand nine hundred and two.

LE BARON B. COLT,
U. S. Circuit Judge.

189 *Acknowledgment of Service on Citation on Appeal.*

DEC. 11, 1902.

Service of the within citation is hereby accepted, with the same effect as though the same had been served by the marshal, but without prejudice to any other rights of the appellee.

A. E. PILLSBURY,
For The City of Newburyport, Appellee.

190 *Clerk's Certificate.*

UNITED STATES OF AMERICA, }
District of Massachusetts, } *ss:*

I, Alexander H. Trowbridge, clerk of the circuit court of the United States for the district of Massachusetts, within the first circuit, certify that the foregoing is a true copy of the record and all proceedings in the cause in equity entitled, No. 924, Newburyport Water Company, complainant, *v.* City of Newburyport, defendant, in said circuit court determined, the opinions of the circuit court, dated,

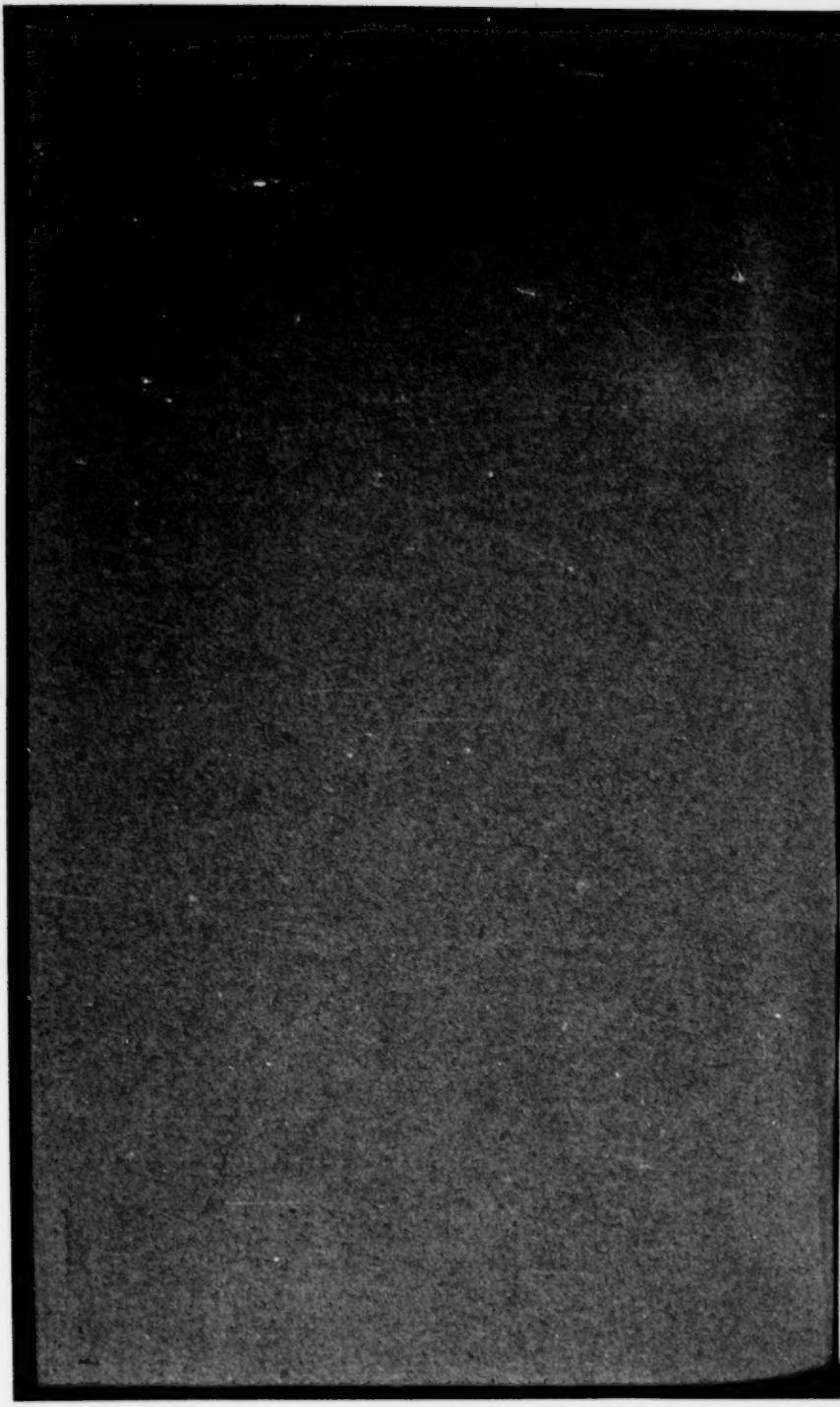
respectively, February 24, 1898, August 8, 1900, and March 5, 1902, the docket entries, the claim of appeal, the assignment of errors and the bond to party on appeal, and also the original citation issued upon the appeal of the complainant in said cause, with the acknowledgment of service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this thirty-first day of December, A. D. 1902.

[Seal of the Circuit Court, Massachusetts.]

ALEX. H. TROWBRIDGE, *Clerk.*

Endorsed on cover: File No. 18,770. Massachusetts C. C. U. S. Term No. 182. The Newburyport Water Company, appellant, vs. The City of Newburyport. Filed January 2, 1903.



17540

(18,771.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 183.

THE GLOUCESTER WATER SUPPLY COMPANY, APPELLANT,

vs.

THE CITY OF GLOUCESTER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

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1 *Transcript of Record of Circuit Court.*

UNITED STATES OF AMERICA, *District of Massachusetts,* } ss:

At a circuit court of the United States for the first circuit begun and holden at Boston within and for the district of Massachusetts on Thursday the fifteenth day of May, in the year of our Lord one thousand nine hundred and two, before the Honorable Le Baron B. Colt, circuit judge.

GLOUCESTER WATER SUPPLY COMPANY, Complainant, v. CITY OF GLOUCESTER, Defendant. } No. 1519. Equity.

The bill of complaint in this cause was filed in the clerk's office on the first day of July, A. D. 1901, and was duly entered at the May term of this court, A. D. 1901, and is in the words and figures following:

2 *Bill of Complaint.*

Filed July 1, 1901.

To the judges of the circuit court of the United States for the district of Massachusetts:

The Gloucester Water Supply Company, a corporation duly established under the laws of the Commonwealth of Massachusetts, and located therein, brings this bill of complaint against the City of Gloucester, a municipal corporation duly established under the laws of said Commonwealth and located in the county of Essex and said Commonwealth.

And thereupon your orator complains and says:

1. Your orator, The Gloucester Water Supply Company, is a corporation duly established and existing under, and by virtue of, the provisions of an act of the general court of Massachusetts entitled "An act to incorporate the Gloucester Water Supply Company," approved March 31, 1881, and constituting chapter 167 of the Acts and Resolves passed by the General Court of Massachusetts in the year 1881, a copy of which act, marked "Exhibit A," is hereto annexed and made part hereof; and said corporation is located in said county of Essex.

2. The defendant, City of Gloucester, is a municipal cor-
3 poration duly established and existing by and under chapter 246 of the acts of said general court in the year 1873, and is located in said county of Essex.

3. In the year 1880 an act was passed by said general court, to wit, chapter 203 of the acts of said general court passed in 1880, which act authorized said city to take a supply of water and to construct a plant for the distribution of water, and provided that the same should become void unless accepted by two-thirds of the legal voters of said city present and voting thereon within six months from the passage of said act; and said act was not accepted by said required vote; but your orator is informed and believes, and therefore avers, that it was rejected by a vote of eighty-nine (89) in favor of the acceptance of said act to five hundred and sixty-seven (567) against the same.

A copy of said act of 1880 (chapter 203) marked "Exhibit B" is hereto annexed and made part hereof.

4. The said act of 1881 (chapter 167) was duly accepted by the incorporators named therein; and thereafter a water supply system was duly established and operated as provided in said act; and within three years from the passage of said act said Gloucester Water Supply Company availed itself of the provisions of said act and commenced a prosecution of the work therein authorized; and under date of the twenty-eighth day of September, A. D. 1886 a contract in writing was made, in accordance with the provisions of section 4 of said act of 1881 (chapter 167) between said Gloucester Water Supply Company and said City of Gloucester, a copy whereof marked "Exhibit C" is hereto annexed and made part hereof.

4 And the plaintiff is informed and believes and therefore avers that the said City of Gloucester, by a majority vote of its city council present and voting jointly thereon on or about September 28, 1886, adopted and authorized the making of said contract in behalf of said city, and that said contract was assented to by said city by a majority vote of the voters present and voting thereon at meetings called for that purpose in the several wards of said city, and that said last mentioned voting was held on or about October 19, 1886, and resulted in eight hundred and eighty-three (883) votes assenting to said contract and two hundred and five (205) votes against the same; and that the making of said contract was duly authorized, and the signing thereof both by and on behalf of the plaintiff and defendant herein were duly authorized. And plaintiff says that by said contract it was provided that said company should furnish to said city water for fire purposes for a period of ten years, unless sooner terminated by the purchase of said company's property and franchises by said city in accordance with section seven of chapter one hundred and sixty-seven of the acts of the year eighteen hundred and eighty-one of said Commonwealth. And it was also provided that said company should maintain at all times an ample supply of water in its reservoir on Bond's hill, and should conduct therefrom a supply of water to the full capacity of the main pipes to and for all hydrants furnished under said agreement, so that all hydrants so furnished should be constantly supplied with sufficient water at all times for fire purposes, excepting in such sections as it should be absolutely necessary to cut off tem-

porarily for repairs or extensions; that the said city agreed to pay to the said company sixty dollars ($60.) yearly for each and every hydrant set by said company under said contract, and for the use of water therefrom, and that the said term of years should begin as soon as the hydrant or hydrants ordered and located were set and a test of the efficiency of the same and the water supply was given satisfactory to the city council of said city or to persons by it designated; and in case the city should increase the number of hydrants to one hundred the cost thereafter to said city should not exceed fifty dollars ($50.) yearly for each hydrant.

5. And plaintiff says that a further contract was made and executed between said company and said city dated under date of the fifteenth day of July, 1887, which contract, for convenience is hereafter called contract No. 2, and said contract of September 28, 1886 is hereinafter for convenience called contract No. 1; and plaintiff says that by the terms of said contract No. 2 it was agreed as follows, to-wit;

"It is agreed, that the contract between the parties hereto, dated September twenty-eighth, eighteen hundred and eighty-six, shall, upon the execution of this contract and its ratification by vote as hereinafter set forth, be thereupon and thereby annulled, that except where express reference is herein had to said contract by indenture dated the twenty-eighth day of September, eighteen hundred and eighty-six, said last named contract may be used for the purpose of explaining this instrument; but nothing herein contained shall be construed to mean that said water company shall be released from its obligation, already incurred in regard to the forty hydrants heretofore contracted for by said city, but the same shall be furnished and maintained by said water company, in accordance with the terms of this indenture, the rate or charge for such hydrants being altered agreeably hereto.

Provided however, that this contract shall be of no force and effect until the same has been assented to by said city by a majority vote of all the voters thereof present and voting thereon at a legal meeting called for that purpose as provided in section four of chapter one hundred and sixty-seven of the acts of the year eighteen hundred and eighty-one and amendments thereof."

And plaintiff says, on information and belief, that said contract No. 2 was assented to on or about August 9, 1887, by said city by a majority vote—(to wit, 387 in favor thereof and 240 against the same)—of all the voters thereof present and voting thereon at a legal meeting called for that purpose as provided in section 4 of chapter 167 of the Massachusetts Acts of the year 1881 and amendments thereof, to wit, the act constituting chapter 288 of the Acts and Resolves passed by the general court of Massachusetts in the year 1887, which act amends section 4 of said chapter 167 of the year 1881 by adding at the end of said section the following words.—"Or at any regular municipal election; and the warrant for notifying such meetings if called specially as aforesaid shall specify when the polls shall be opened for the purpose of vot-

ing and when they shall be closed;" and a copy of which act of 1887 (chapter 288) marked "Exhibit D" is hereto annexed and made part hereof.

And plaintiff says that in and by said contract No. 2 it was agreed by the parties thereto as follows.—

That—as said company had introduced water into the streets of said city, and as said city was desirous that its citizens should have the best possible protection against fire,—the said company should furnish said city water for fire purposes for the balance of the period of ten years already agreed upon by contract No. 1, unless sooner terminated by the purchase of said company's property and franchise by said city in accordance with section 7 of chap. 167 of the Acts of the year 1881 of said Commonwealth.

And that said company should set up and maintain during said period one hundred first-class three-nozzle post fire hydrants in addition to the forty hydrants already contracted for in contract No. 1.

7 Also that said company should maintain at all times an ample supply of water to the full capacity of the main pipes to and from all hydrants furnished under said contract No. 2 and said contract No. 1, so that all hydrants so furnished should be constantly supplied with sufficient water at all times for fire purposes, excepting in such sections as it should be absolutely necessary to cut off the same temporarily for repairs or extensions:

That said city should pay said company the sum of fifty dollars ($50.) yearly for each of the first one hundred hydrants furnished, and for the remainder forty dollars ($40.) each yearly, it being understood that the forty hydrants contracted for in said contract No. 1 should be numbered among the first hundred; and that the charge or payment for each hydrant should begin as soon as such hydrant had been ordered and located, and a satisfactory test of its efficiency given to the city council, or to persons by it designated.

That all hydrants should be set up and maintained at the expense of said company; and that they should be set up under the direction of said city or its agents.

That in case said city should determine to discontinue the use of any hydrant, such hydrant should be removed at the expense of said city, the charge and payment therefor thereafter to cease.

That if said city should set up and maintain a lighted fountain, said company should furnish water therefor during the whole of said term, but only during all non-freezing months, without additional expense.

8 That if said city should set up a public drinking fountain, said company should furnish water therefor for the period of one year after the setting up of the same, free of charge.

And that any owners of property in said city who should sustain damage by reason of the failure of said company to fulfill its contract, should have the same right of action and the same remedies against said company as if the contract were made between said company and said property owners. A copy of said contract No. 2,

marked "Exhibit E Contract No. 2," is hereto annexed and made part hereof.

6. And plaintiff says that the promises and provisions of said contract were duly performed by the parties thereunto until the time when the defendant city took possession of the property of the plaintiff company as hereinafter set forth in paragraph 15 of this bill; and that at said time the said city was using one hundred and eighty-one (181) hydrants under said contract No. 2.

7. The plaintiff claims, and avers, upon information and belief, that it was the intent of the legislature to vest in the plaintiff company,—in, by and under said acts of the legislature of general court, and in and by said contracts No. 1 and No. 2, which were made and entered into in pursuance of said acts and within the authority thereof,—the exclusive right of furnishing the inhabitants of said city with pure water for the extinguishment of fires, and for domestic, mechanical and other purposes, and the exclusive right to furnish said city with a supply of water for fire and other purposes, said exclusive rights to exist and continue unless and until the said city should exercise its right under section 7 of chapter 167 of the
9 Acts of 1881 to purchase the corporate property and all the rights and privileges of said company as therein and thereby provided.

8. The plaintiff on information and belief says that on March 3, 1893 the board of aldermen of said city passed the following order, to wit:—

"Ordered, that for the purpose of constructing a system of water works for and within the city of Gloucester and for authority to take, hold and convey through the said city of Gloucester or any part thereof the water of any springs, natural ponds, brooks or other water source (not otherwise granted) this board by and with the consent of the common council petition the general court now in session for an act to supply the city of Gloucester with pure water for the extinguishment of fires and for domestic, mechanical and other purposes; that the city solicitor be instructed to prepare a bill covering all matters essential to a thorough and proper construction of said works and all the details necessary for a proper bill; said bill to be presented to the legislature by said city solicitor on or before the fifteenth day of March, A. D. 1893. That his honor the mayor together with the city solicitor be instructed to appear before the proper committee of the legislature at such time as a hearing may be granted on the aforesaid petition and advocate for and in behalf of the city of Gloucester the passage of the bill to supply the city of Gloucester with pure water."

That the common council of said city concurred in said order of March 7, 1893 and that the same was approved on March 10, 1893 by the mayor of said city; and that in pursuance of such order said board of aldermen presented a petition to the senate and house of representatives composing the legislature or general court of Massachusetts praying for the passage of an act authorizing the city of Gloucester to construct within its borders a system of water works

for the extinguishment of fires and for mechanical, domestic and other purposes, and to take the water of any springs, natural ponds, brooks or other water sources (not otherwise granted) and to hold and convey the same through the said city or any part thereof, in accordance with the draft of a bill to be thereafter submitted
10 in aid of said petition. A copy of said petition marked "Exhibit F" is hereto annexed and made part hereof. Said act, the passage of which was petitioned for as aforesaid, was drawn as provided in said order, and was presented in behalf of said city, and a copy thereof marked "Exhibit G" is hereto annexed and made part hereof.

And the plaintiff says on information and belief that the passage by said legislature of said act a copy whereof is marked "Exhibit G" was advocated in behalf of said city as provided in said order, and was opposed by the plaintiff, and that the said petition and act were referred to the next general court or legislature of the year 1894; and that in the month of January 1894 it was ordered by said common council and said board of aldermen in concurrence that a joint special committee to consist of the mayor of said city, the city solicitor of said city, and such members of the board of aldermen as might be joined be appointed to procure a charter for a municipal water plant for said city, with authority to use all lawful means for the same, and that the city engineer of said city be added to said committee; that thereafter during the session of said legislature of 1894 the plaintiff and defendant herein were both heard by a committee of the said legislature of 1894,—the said defendant city in support of said act and petition in accordance with said last mentioned order, and the plaintiff against the same;—and that said committee reported that the said city have leave to withdraw; and that the said legislature in both branches accepted said report in concurrence; that said joint special committee appointed in accordance with said last mentioned order afterwards reported to the city government of said city, and that thereupon the said city,
11 by its board of aldermen and common council, and by the approval of its mayor, took action as set forth in the city records of said city, voluma 16, 1894, page 314, a copy of which is as follows:

"In Board of Aldermen, Tuesday, *June* 19, 1894.

Water Charter.

From the joint special committee appointed to procure an act authorizing the city to construct and maintain a system of municipal water supply, reporting in detail the expenses attending the work, the employment of counsel, expert engineers in the prosecution of the same, and all matters pertaining to the preparation of the case and the final result, reporting the total expenses $4360.82 and recommending that the contest for our rights be renewed by the city, if necessary, before the next legislature and that this committee be

continued for the purpose of making needful preparations to that end.

Same read, accepted and the recommendation adopted.

Sent down for concurrence.

In common council, June 19, 1894.

Concurred.

Approved June 20, 1894 by Benj. F. Cook, mayor.

From 'City Records,' vol. 16, 1894, page 314."

9. And plaintiff, on information and belief, says that on or about November 8, 1894 the board of aldermen of said city and the city council of said city in concurrence adopted the following orders:—

"Ordered, that his honor the mayor be and he hereby is authorized to petition the general court, at its next session for the passage of a municipal water supply act.

Ordered, also.—That the city solicitor be and he hereby is instructed to draw up a suitable bill to accompany said petition."

And that on November 10, 1894 the same were approved by the mayor of said city. And that on or about November 20, 1894 the said city (by its mayor thereunto duly authorized by said order of the city council) presented a petition to the senate and house of representatives composing the legislature or general court of Massachusetts praying for the passage of an act authorizing said city to acquire
12 and maintain a water supply for the extinguishment of fires, and for mechanical, domestic, and other purposes for the city and its inhabitants, and to acquire therefor the waters of any springs, ponds, lakes, brooks or other water sources, and especially certain sources of supply in the towns of Essex, Wenham and Hamilton; and to supply said town of Essex as well as said city of Gloucester, and to have all rights and privileges necessarily or properly incidental to the subject of said petition; that a copy of said petition marked "Exhibit H" is hereto annexed and made part hereof; that said petition was accompanied by a proposed act drawn by the city solicitor of said city pursuant to said order of November 8, 1894, a copy of which marked "Exhibit I" is hereto annexed and made part hereof;—that on or about January 7, 1895, the board of aldermen of said city and the city council of said city in concurrence adopted an order providing that a joint special committee be appointed consisting of the mayor, the president of the common council, the city solicitor, the city engineer, three members of the board of aldermen, together with such members of the common council as they may join, all of said city, with authority and instructions to use any and all lawful means to procure a charter for a municipal water plant for said city, and that said order was approved by the mayor of said city January 14, 1895; that said petition and act last above mentioned were also referred by the said legislature to a committee thereof, who heard the parties interested therein especially said city, represented as provided in said orders, in favor of said petition and act, and said company, which appeared in opposition thereto. Said committee also reported

that the city have leave to withdraw; but notwithstanding
13 such report and the said opposition of said company, a bill was substituted in the house of representatives of said legislature for said report of the committee; that the bill so substituted was drawn and substituted at the instance of said city by its duly authorized agent or agents, and a copy of the bill so substituted marked "Exhibit J" is hereto annexed and made part hereof; and that, notwithstanding the said efforts of the plaintiff company in opposition to the said petitions and bills of said city and to the said bills presented as aforesaid, said city caused the general court or legislature of Massachusetts to pass the act entitled "An act to supply the city of Gloucester with water," and which constitutes chapter 451 of the Acts and Resolves passed by the general court of Massachusetts in the year 1895 (which act was approved June 4, 1895), and a copy of which act marked "Exhibit K" is hereto annexed and made part hereof.

10. And the plaintiff says that it was provided in section 17 of said act of 1895 (chapter 451) that the said act should be submitted to the qualified voters of said city for its acceptance and should be void unless such voters, voting in their respective wards and precincts at a legal meeting called for that purpose by order of the city council, in the same manner as meetings for municipal elections are called, or at any regular municipal election, should within one year from the passage of said act, determine by ballot by a majority vote by those present and voting thereon to accept the same; and that the warrant for notifying such meeting, if called especially as aforesaid, should specify when the polls should be open for the purpose of voting and when they should
14 be closed. And plaintiff says that by the terms of said act of 1895 (chapter 451) said city was authorized to compete with said company in supplying water to said city and its inhabitants, and was particularly authorized to supply itself,—the said city,—and its inhabitants with water for the extinguishment of fires unless, (as provided in sec. 16 of said act,) said company should notify in writing the mayor of said city within thirty days after said act shall have been accepted by said city as above alleged, that it, the said Gloucester Water Supply Company, "desires to sell to said city all the corporate property and all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools and all appliances owned by said company, and used in supplying said city and the inhabitants thereof with water," and unless (as provided in said section 16) said company should, within the same time, file with the city clerk of the said city a specification and description thereof. And it was thereupon provided (in the same section) as follows.—

"Said company is authorized to make sale of said property to said city, and said city is authorized to purchase the same and manage and use the property thus conveyed for the purposes and under the provisions of this act."

It was further provided therein that, whenever, within one year

from the passage of said act, said city should by a majority vote of the legal voters of said city, present and voting thereon at a legal meeting called for that purpose by order of the city council, or at any regular municipal election, vote to purchase said property, notice of the desire of said company to sell the same having been given as hereinbefore provided, said property should thereupon become the property of said city, and said city should pay to said company the fair value thereof, to be ascertained as follows, to wit, that in case said city and said company, after conference thereon, should be unable to agree upon the value of said property, the supreme judicial court of Massachusetts should, upon application of either party and notice to the other, appoint three commissioners, who should determine the fair value of said property, and whose award, when accepted by the court, should be final; and that such value should be estimated without enhancement on account of future earning capacity or future good will, or on account of franchise of said company.

11. And the plaintiff says on information and belief that said City of Gloucester, at a legal meeting duly called for that purpose, and duly held upon the twenty-third day of July 1895, duly voted to accept said chapter 451 of the Acts of 1895.

12. And the plaintiff says that at a meeting of the stockholders of said Gloucester Water Supply Company, duly called for the purpose and duly held at said Gloucester upon the fourteenth day of August 1895, the following vote was duly passed:—

"Whereas, the Gloucester Water Supply Company was incorporated under chapter 167 of the Acts of the Legislature for the Year 1881, for the purpose of furnishing the inhabitants of the city of Gloucester with pure water for the extinguishment of fires, and for domestic, mechanical, and other purposes, with all the powers and privileges, and subject to all the duties, restrictions and liabilities set forth in said act; and

Whereas, by said act it was provided that the City of Gloucester should have the right at any time during the continuance of the charter of said company, to purchase the corporate property, and all the rights and privileges of said company at such price as might be mutually agreed upon between said company and the City of Gloucester, and that said company should be authorized to make sale of its said property, and all its rights and privileges to said city, and that in case said company and said city should be unable to agree upon the compensation to be paid for the same, such compensation should be determined by three commissioners to be appointed by the supreme judicial court, upon application of either party and notice to the other, whose award, when accepted by the court, should be binding upon both parties, and that the authority to said city to purchase said franchise and property of said company, was granted on condition that the same should be assented to by said city by a two-thirds vote of the voters present and voting thereon, at a meeting called for that purpose in the several wards of said city; and

Whereas, it is provided by section 16 of chapter 451 of the Acts of the Legislature of Massachusetts for the Year 1895, that if, within thirty days after said act shall have been accepted by the City of Gloucester, as therein provided, the Gloucester Water Supply Company shall notify the mayor of the city of Gloucester, in writing, that it desires to sell to said city all its corporate property, and all the rights, privileges, easements, lands, waters, water-rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all appliances owned by said company and used in supplying said city and the inhabitants thereof with water, and shall file with the city clerk of said city a specification and description thereof, said city shall not proceed to supply water to itself or its inhabitants under the authority of this act, unless it shall have first purchased of said company the property aforesaid; and

Whereas, the City of Gloucester, at a legal meeting called for that purpose on the twenty-third day of July, 1895, duly voted to accept said act; and

Whereas, the Gloucester Water Supply Company claims that, in the event of the purchase by said city of its franchise and property, said city is liable to pay therefor a just, reasonable and full compensation, and that if said chapter 451 of the Statutes of 1895 undertakes to authorize said city to acquire said franchise and property for less than the just, reasonable and full compensation therefor, such provision is unconstitutional and void;

Now, therefore, in compliance with section 16 of chapter 451 of the Statutes of 1895, it is hereby

Voted, that this company desires to sell to the said City of Gloucester all the corporate property, and all the rights, privileges, easements, lands, waters, water-rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all appliances owned by said company and used in supplying said city and the inhabitants thereof with water, and that David W. Low, the clerk of said company, is hereby authorized and directed to notify the mayor of said city of Gloucester, in writing, that the company so desires to sell said property and franchises, and that David W. Low, clerk of said company, is hereby authorized and directed to sign and file with the city clerk of said city a specification and description of all the property aforesaid."

13. And plaintiff says that upon the fifteenth day of August, 1895, it duly notified the mayor of said city of Gloucester in writing, that it desired to sell to said city all the corporate property, and all the rights, privileges, easements, lands, waters, water
17 rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all appliances owned by said company and used in supplying said city and the inhabitants thereof with water, a copy of which notice is hereto annexed marked "Exhibit L" and made part hereof. The copy of the vote referred to in said notice is the same as the copy of the vote above set forth in paragraph numbered 12 of this bill.

14. Plaintiff says that upon said fifteenth day of August 1895 it

duly executed and filed with the city clerk of said city a specification and description of all said property, as provided in section 16 of said chapter 451 of the Acts of 1895, a copy of which specification and description marked "Exhibit M" is hereto annexed and made part hereof.

For convenience said paper is hereinafter called "Said *Specification.*"

15. And the plaintiff says, upon information and belief, that the said city, upon the twenty-fourth day of September 1895, by a majority vote of the legal voters of said city present and voting thereon, at a meeting duly called for that purpose, voted to purchase said property; and that thereafter on the first day of October, A. D. 1895 said city took possession of the same and has since continued to possess, hold, occupy and use the same for the benefit of said city and its inhabitants.

16. And the plaintiff says that said city and the petitioner on or about the twenty-second day of October, 1895, by their duly authorized respective representatives, held a conference for the purpose of endeavoring to agree upon the value of the said
18 property to said Gloucester Water Supply Company, as provided in said section 16 of chapter 451 of the Acts of 1895, but were unable to agree upon the fair value of said property. And that thereafter, to wit, on or about the twenty-ninth day of October, 1895, the plaintiff herein filed a petition in the supreme judicial court for the county of Essex and Commonwealth of Massachusetts praying the court to appoint three commissioners, in accordance with the provisions of said section 16 of chapter 451 of the Acts of 1895, to determine the fair value of said property; and that on or about the twenty-fourth day of September, 1897, said court appointed Everett C. Bumpus, John R. Freeman and John W. Ellis to act as commissioners under said section 16 of chapter 451 of the Acts of the Year 1895.

17. And the plaintiff says that said commissioners heard said company and said city and their respective witnesses and counsel, and on or about the twenty-ninth day of June, 1900, made a report to said supreme judicial court and therein valued, according to their construction of said section 16 of chap. 451 of the Acts of 1895 the said property of the plaintiff; that in said report certain property of the said plaintiff company, consisting of three rights belonging to said company, was not valued by said commissioners, and was not included in the valuation made and reported by them; that said three rights were as follows:

1. The franchise right to take additional sources of supply in ward 8 in said city;

2. The franchise right to lay and maintain pipes in the streets of said city;

19 3. The franchise right to charge water rates for water supplied to said city and its inhabitants.—

That the value of said three rights is, in fact, covered by and in-

cluded in the value and amount of the earnings and income of the plaintiff company.

That in reporting the valuation found by said commissioners and in excluding said three rights from valuation the said commissioners reported as follows.—

"The commissioners appointed under section 16, chapter 451, act of 1895, to appraise the corporate property transferred by the Gloucester Water Supply Company to the City of Gloucester, September 24, 1895, under the provisions of this statute, having heard the parties, respectfully submit this report.

Section 16 directs the commissioners to determine the fair value of all the corporate property of the company, and all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all appliances owned by said company and used in supplying said city, and the inhabitants thereof, with water, but that such value shall be estimated without enhancement on account of the future earning capacity, or future good will, or on account of the franchise of said company.

In valuing the property, we have followed the rule adopted by the court in the Newburyport case, 168 Mass. 341, *i. e.*, have found the worth of the physical plant at its cost, less its depreciation, Sept. 24, 1895, the water and water rights as property, and have added a sum as and for a going plant so as to give a fair value for the same. All the personal and other property not physically attached to the water plant has been appraised at a fair value. We have also, with the respondent's consent, valued at what we deemed it worth a contract subsisting Oct. 1, 1895, between the city and the company, to furnish the former with water for its hydrants, for a certain price until Sept. 28, 1896.

In valuing the water and water rights, we have practically followed the Newburyport case, *i. e.*,

1. Valued the water collected in the reservoirs and pond upon the date of the transfer.

2. The water rights of the company, taking into account not only the land, reservoirs, dams, and everything else that created them, but also the quantity and quality of water that gathers at these points, and its adaptability to the purposes for which it was in use when sold. We have valued this right at what we have deemed it fairly worth, taking into account its elevation, proximity, capacity, adaptability, usefulness, and connection with and relation to the plant, and having regard to the fact that we are valuing, not what income this water had yielded or might yield in conjunction with the rest of the property, but the right to have water gather at this place to be used for such purposes.

We heard evidence, against the respondent's objection, upon the worth of the rights, based upon the capitalization or consider-
20 ation of the value (irrespective, as it was claimed, of franchise rights or earning capacity) of the amount of water that could be relied upon to annually collect at these sources. Upon

the conditions existing in this case, we do not think that this evidence should be applied, and excluded the same.

We admitted, against the petitioner's objection, and considered the original cost of the land, which we find to be about $7,327.20, dams and other appurtenances belonging to the water rights, and any improvements and enhancements in, and changes to, the same; also the cost of creating and maintaining a supply of water, like in amount and quality, for use at the distributing plant from two other practical sources, and all evidence bearing upon every other element referred to in the Newburyport Case rule, in order to determine the extent and worth of these property rights. The company paid nothing for its water or water rights independently of the price paid for the land.

We followed the rule also employed in the Newburyport case, as far as the terms of said section 16 permitted 'that the plant was a going concern and in full operation at the time of the transfer—one that had been tested by experience and with which the city could begin the immediate prosecution of the business of supplying water to the established connections for domestic and municipal purposes (including in the latter hydrant service)—and upon an examination of these facts are of opinion that the property had a greater value (for the purposes of its use by the city by reason thereof) than if the plant had not been in full operation, and that this should be considered in passing upon the value of the entire plant.'

The respondent claimed that nothing should be allowed under this rule, as we had allowed all that was contemplated by the statute. We do not think so. We have ascertained the cost of duplication, less depreciation, of the different features of the physical plant, and have treated the water and water rights as already stated, but that to our mind does not represent a fair valuation of this plant, welded together, not only fit and prepared to do business, but having brought that business into such a condition that there is an enhanced value created thereby, so that the city in purchasing it, without considering its income or right to do business, but having the power to carry it on its own account, should pay more for the property as such than as if this consideration did not obtain. This is a value that we have found to be seventy-five thousand dollars ($75,000) that has been imported into the plant, which seems to us as much a part of the property valuation as any other part of it.

In appoaching a valuation by this method, we have not considered the past, present or prospective income, good will, or the franchise rights. We have arrived at this conclusion on account of the phrase in section 16, chapter 451, Acts of 1895, that such value shall be estimated without enhancement on account of future earning capacity or future good will, or on account of the franchise of said company, and do not think that in the construction thereof the word 'future' qualifies this conclusion. We have treated it as property which the company can no longer use, but the city can, and is to pay a fair value for upon these conditions.

If, however, the fact of the income which the company was
21 receiving at the transfer is an element that can, under this
statute, be considered as bearing upon the question of a fair valuation, this award, as we respectfully submit, ought to be reformed, and the question of valuation be reconsidered."

* * * * * * *

"Upon consideration of the premises, we determined the fair value of the property transferred by the company to the city Sept. 24, 1895, and which was owned by the company and used in supplying the city and inhabitants thereof with water, as hereinbefore described, to be the sum of six hundred thousand five hundred dollars ($600,500), with interest from Sept. 24, 1895. But if the court shall determine that there had been no valid taking of the water and water rights, but despite this fact the same are to be valued and paid for, upon the principle already stated in this report, *i. e.*, that such defect, if any, can be cured for five hundred dollars, then the said award should be six hundred thousand dollars ($600,000) with interest from Sept. 25, 1895. From the amount of the award, in any event, is to be deducted, as of the time of the transfer, the sum of thirty-nine hundred fifty-five and $\frac{40}{100}$ dollars ($3,955.40), being the amount agreed upon to be so deducted upon an accounting between the city and the company.

This property is subject to an existing mortgage made to secure outstanding bonds to the amount of two hundred and fifty thousand dollars ($250,000), bearing interest at five per cent. per annum, payable Jan. 1, and July 1, and maturing Jan. 1, 1905. If, at the time of the payment of the award, any of these bonds remain outstanding, an amount sufficient shall be retained by the city to indemnify, and save itself harmless for the payment of these bonds when they mature.

We award that the costs shall be twenty-seven thousand dollars, of which the petitioner shall pay five thousand five hundred dollars, and the balance shall be paid by the respondent. Any amount allowed by the court, and paid by the county of Essex, on account of the costs or fees of the commissioners, shall be credited and paid to the respondent.

The petitioner, having paid all of the costs, may recover all but fifty-five hundred dollars from the respondent."

In another portion of said report of said commissioners, in refusing to value the company's franchise right to take additional sources of supply in ward 8, said commissioners reported as follows.—

"There are four other sources of supply in ward eight, and none other in Gloucester so far as it appeared. Of these, Magnolia swamp we deemed to be impracticable for this service; but Haskell's Pond property, whose watershed connects with Dikes reservoir, Fernwood
brook, connecting with Wallace reservoir, and Poll's island,
22 would furnish sufficient portable water as a substitute for the
sources in use by the company in 1895, and as supplementary sources thereto.

The petitioner asked us to take into account and value its interest in these additional sources, inasmuch as its charter of 1881 gave it the right to take them; but as it had not reduced the same into possession or created any property rights to be valued, we declined to do so, as the statute, under which we are acting, prohibits us from considering the franchise rights, which we deemed this claim to be. The failure to take and create property by the exercise of its franchise rights gives nothing that we can appraise under the statute. We, however, permitted the petitioner's experts to take into consideration the effect upon the value, if any, of the water rights owned by the company by the presence of these additional supplies.

We did not, after considering the amount of the available water supply of the company in 1895, enhance the value of its supply on account of the presence of the supplementary sources, but the fact that they could be so employed prevented any impairment under any claim that the company's sources would be shortly exhausted, and therefore likely to be abandoned."

Said commissioners also reported that the respondent requested certain rulings, a copy of which was annexed to said commissioners' report, and the rulings of said commissioners thereon were set forth in Exhibit D annexed to said report. And plaintiff says that amongst the rulings so requested by the respondent,—the said city,—were the following.—

"1. In ascertaining the fair value of the property, it is to be considered as a whole and as a live and going water plant, in connection with takers and in immediate condition to supply water at the time of the transfer, and each part of it is to be valued upon this basis; and when the fair value of the whole property is determined upon this basis, the commissioners are not at liberty to add to such value any further sum by reason of the fact that the company was a live and going water plant, in connection with takers, and in immediate condition to supply water at the time of the transfer, or by reason of either of these facts.

2. The fair value of the property, to be determined by the commissioners, is not its value for the purposes of its use by the city of Gloucester or its inhabitants, but its fair value generally, for any use to which it is adapted as property, not involving the exercise of any public franchise or franchise rights."

And that the rulings of said commissioners in reference to said rulings 1 and 2 respectively were the following marked 1 and 2 respectively.—

23 "1. The rule that we adopted with reference to this matter was as stated in the report, *i. e.*, we ascertained the cost of duplication, less depreciation, of the different features of the physical plant, and valued the water and water rights as stated in the report. This we think does not represent a fair valuation of this property welded together, not only fit and prepared to do business, but having brought that business into such a condition that there is an enhanced value created thereby to the property, so that the city in purchasing it, without considering its income or right to do busi-

ness, but having the power to carry it on on its own account, should pay more for the property as such than as if this consideration did not obtain. This is a value we have found to be seventy-five thousand dollars ($75,000), that has been imported into the plant, and seems to us as much a part of the property valuation as any other part of it. We valued the property in its entirety, and included this amount as a part of that valuation.

2. The city of Gloucester having purchased the property as and for a water plant in its entirety, and as that is the use to which it is best adapted, we have valued the same as such, and in doing so have not involved the exercise of any public franchise or franchise right, nor what it was worth to the city or to the petitioner, but what it was fairly worth, having regard to all the facts."

And plaintiff further says that said city claimed before said commissioners that the contract, subsisting Oct. 1, 1895 between said city and said company,—being said contract No. 2,—was not, under said chap. 451 of the Acts of 1895, to be included in the valuation and award to be made under said act; nevertheless said city by its counsel suggested to said commissioners that said contract be valued by them, and accordingly it was so valued; such valuation not, however, appearing separately, but being included in said sum of $600,500.

18. And plaintiff says that both said company and said city objected to said report of commissioners and the award therein made, and that after said report was filed in said supreme judicial court, and before the same was brought before a justice of said supreme judicial court the said company (the plaintiff herein), moved that said award of the commissioners be recommitted with in-
24 structions to receive and consider evidence to prove the earnings of the company for each and every year from the time of its organization until the sale and transfer of the property to the city of Gloucester, and to reform the award as in their judgment may be proper; and that said city also filed a motion or motions a copy of which marked "Exhibit N" is hereto annexed and made part hereof; and that thereafter said report and the award therein and thereby made came on to be heard before a single justice of said supreme judicial court, and that said justice, on July 31, 1900, reserved the case thereon for the consideration of the full court "upon the motions of the parties and the questions of the acceptance or recommittal of the award, it being agreed by the parties that any questions of law raised by either party and appearing in the award by the motions of either party to recommit the award, should be hereby reserved."

That thereafter said report and award of said commissioners and said motions and questions were argued by counsel for both said parties before, and were considered by, said full court; and that thereafter, to wit, on or about June 19th, 1901, said full court by Loring, J., rendered a decision and opinion confirming said report of the commissioners in the exclusion as aforesaid, (*ante*, par. 17)

from valuation of the said rights and earnings and income of plaintiff company.

A copy of said opinion, marked "Exhibit O," is hereto annexed and made part hereof.

19. Plaintiff further says that, in effect, said chap. 451 of the Acts of 1895 threatened said company with municipal competition by said city, and with the loss and ruin which would inevitably result from such municipal competition authorized under said
25 chapter, unless said company should sell and transfer, apparently voluntarily, to said city the said company's property upon the terms of said chapter as construed and applied by said commissioners (*ante*, par. 17) and said full court (*ante*, par. 19); that such sale and transfer and the said acts of the plaintiff,—its officers, agents and stockholders, in reference thereto, (*ante*, par. 12 and par. 13) were influenced and compelled by said threat and were compulsory in fact and in law.

20. Plaintiff further avers and claims that the effect of said chapter 451 of the Acts of 1895 under the circumstances alleged and as construed and applied by said commissioners and by said full court as aforesaid was to violate plaintiff's rights under the Constitution of the United States and that said act of 1895 is unconstitutional and void.

Plaintiff claims that under the above general claim of constitutional rights plaintiff is entitled under this bill without pointing out specific parts of said Constitution, to the protection of every right secured to it thereby; but for convenience plaintiff avers and sets up the following specific claims, reserving, however, the right to the benefit of all plaintiff's other rights under said Constitution in addition to those specifically claimed below.

Plaintiff further avers and claims.—

(*a.*) That said act of 1895, (chap. 451) impaired and impairs the obligation of plaintiff's said contracts (including plaintiff's franchises) and thereby violates section 10 of article 1 of the Constitution of the United States and plaintiff's rights thereunder.

26 (*b.*) That by said legislation, as construed and applied as aforesaid, the State or Commonwealth of Massachusetts deprived and deprives plaintiff of its property without due process of law, in violation of said article 14 of amendments to the Constitution of the United States, and of plaintiff's rights thereunder.

(*c.*) That by said legislation, as construed and applied as aforesaid, the State or Commonwealth of Massachusetts denied and denies to plaintiff and its stockholders the equal protection of the laws, in violation of article 14 of the amendments to the Constitution of the United States, and of plaintiff's rights thereunder.

21. Plaintiff further avers upon information and belief

(*a.*) That the said act of 1895 (chap. 451) was novel; that the only act at all resembling it in the terms of the so-called "sale" was the Massachusetts act of 1894 (chap. 474) the effect and constitutionality of which are still in litigation.—

(*b.*) That it is the policy and practice of the Federal courts not to

pass upon the constitutionality of statutes while there remains an opportunity for the adoption of such construction of the statute involved as would avoid the point or points upon which such constitutionality is questioned.—

(*c.*) That it was open to said full court to hold, as claimed before it by said company that said company was entitled under said act of 1895 (chap. 451) to compensation from said city for all its, the said company's, property except its franchise to be a corporation, and thereby to obviate all questions of constitutionality raised and sought to be raised in, by and under this bill.—

27 (*d.*) That it was not open to the plaintiff company to contend before said commissioners and before said full court that said legislation was unconstitutional;

(*e.*) That by proceeding as aforesaid before said commissioners and said full court plaintiff did not waive its right to contend in the proper court or courts that said legislation violated plaintiff's constitutional rights, but on the contrary, plaintiff says that it has always claimed that if said act of 1895 (chap. 451) should be construed and applied as it has been by said commissioners and by said full court, (as hereinbefore alleged, par. 17 and par. 18) the said act is unconstitutional and void.

(*f.*) That no decree or judgment has yet been entered upon the said award; and no payment thereunder has been made or tendered to plaintiff.

22. Plaintiff shows that, in order to make or tender payment under said award the defendant city will be obliged to issue, under the alleged authority of said chap. 451 (section 6) of the Acts of 1895, bonds, notes, or scrip to the amount of $575,000 and upwards.

23. Plaintiff further shows that this is a suit of a civil nature in equity, and avers that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, to wit, that the same exceeds, exclusive of interest and costs, the sum or value of $900,000.—and arises under the Constitution of the United States.

28 Wherefore, your orator, the plaintiff, prays.—

First. That it may be adjudged and decreed that chap. 451 of the Acts and Resolves passed by the general court of Massachusetts, 1895, as construed as aforesaid by the said full court, is unconstitutional and in violation of the rights secured to your orator, the plaintiff, by and under the Constitution of the United States.

Second. That it may be adjudged and decreed that the defendant has taken and holds the property described in said specification, a copy whereof is marked "Exhibit M," in violation of the rights secured to plaintiff by the Constitution of the United States.

Third. And that your orator may have such relief in the premises as the nature and circumstances of the case shall require, and as to your honors shall seem meet.

To the end, therefore, that the said defendant may, if it can, show why your orator should not have the relief herein and hereby prayed, and may full, true, direct and perfect answer make, to the best and

utmost of its knowledge, remembrance, information and belief, to each and all of the matters and things in this bill of complaint contained, and that as fully and particularly as if the same were here repeated, paragraph by paragraph, and they were specially interrogated thereunto, may it please your honors to grant unto your your orator a *subpœna ad respondendum* issuing out of and under the seal of this honorable court, to be directed to the said defendant, The City of Gloucester, commanding it on a certain day, and under a certain penalty to be therein inserted, to appear before your
29 honors in this honorable court, and then and there full, true, direct and perfect answer make to all and singular the premises, and, further, perform and abide by such further order and decree as to your honors shall seem meet.

And your orator, as in duty bound, will ever pray, etc.

GLOUCESTER WATER SUPPLY CO.,
By GEORGE H. NORMAN, *Treasurer.*

L. L. SCAIFE,
Solicitor for Complainant.
ROBERT M. MORSE,
L. L. SCAIFE,
Of Counsel.

30 UNITED STATES OF AMERICA, }
District of Massachusetts, Suffolk County. }

George H. Norman, being duly sworn, says;—That he is treasurer of The Gloucester Water Supply Company, the complainant in the foregoing bill of complaint, and knows the contents thereof; that the allegations therein contained, as far as they relate to his own acts, are true, and as far as they relate to the acts of others, he believes them to be true.

That in regard to all matters and things in the foregoing bill of complaint alleged, which are not within the personal knowledge of this deponent, the deponent has been fully informed, and believes that the same are true.

GEORGE H. NORMAN.

Sworn to before me twenty-ninth day of June, 1901.
[SEAL.] WILLIAM H. FLEMING,
Notary Public.

31 EXHIBIT A.

Acts and Resolves of Massachusetts, 1881, *Chap.* 167.

"An act to incorporate the Gloucester Water Supply Company.

Be it enacted, etc., as follows:

SECTION 1. Joseph O. Proctor, Robert R. Fears, Samuel A. Stacy, Robert A. Tibbets, Nehemiah D. Cunningham, their associates and

successors, are hereby made a corporation by the name of the Gloucester Water Supply Company, for the purpose of furnishing the inhabitants of Gloucester with pure water for the extinguishment of fires, and for domestic, mechanical and other purposes; with all the powers and privileges, and subject to all the duties, restrictions and liabilities set forth in all general laws which now are or hereafter may be in force, applicable to such corporations.

SECTION 2. Said corporation may for the purposes aforesaid take, hold and convey through the city of Gloucester, or any part thereof, the water of any springs, natural ponds, brooks or other water sources in ward eight of said city, and may take and hold by purchase or otherwise any real estate necessary for the preservation and purity of the same, or for forming any dams or reservoirs to hold the same, and for laying and maintaining aqueducts and pipes for distributing the water so taken and held; and may lay its water pipes through any private lands, with the right to enter upon the same and dig therein for the purpose of making all necessary repairs or service connections; and for the purposes aforesaid may carry its pipes under or over any water course, street, railroad, highway or other way, in such manner as not unnecessarily to obstruct the same; and may, under the direction of the city authorities of Gloucester, enter upon and dig up any road or other way for the purpose of laying or repairing its aqueducts, pipes or other works; and in general may do any other acts and things convenient and proper for carrying out the purposes of this act.

SECTION 3. Said corporation shall, within sixty days after the taking of any land or water rights under the provisions of this act, otherwise than by purchase, file in the registry of deeds for the southern district of the county of Essex a description of any land so taken, sufficiently accurate for identification with a statement of the purposes for which it is so taken, and the title of the land so taken shall vest in said corporation. Any person or corporation injured in property by any acts of said corporation, and failing to agree with said corporation as to the amount of damages, may have the same assessed and determined in the manner provided when land is taken for highways; but no application shall be made to the county
32 commissioners for the assessment of damages for the taking of water rights until the water is actually taken and diverted by said corporation. Any person whose water rights are thus taken or affected may apply as aforesaid within three years from the time the water is actually withdrawn or diverted, and not thereafter; and no suit for injury done under this act shall be brought after three years from the date of the alleged receipt of injury.

SECTION 4. Said corporation may distribute the water through said city of Gloucester, may establish and fix from time to time rates for the use of said water, and collect the same, and make such contracts with the said City of Gloucester, or with individuals, or corporations, to supply water for fire or for other purposes, as may be agreed upon by said city, or individuals, or corporations, and said corporation. The City of Gloucester, by a majority vote of its city

council present and voting jointly thereon, is hereby authorized to contract for a supply of water for fire or other purposes, for a term of years with said Gloucester Water Supply Company; *provided*, the contract is assented to by said city by a majority vote of the voters present and voting thereon at meetings called for that purpose in the several wards of said city.

SECTION 5. The capital stock of said corporation shall not exceed three hundred and fifty thousand dollars and shall be divided into shares of one hundred dollars each; and said corporation may at any time issue bonds to an amount equal to the capital stock actually paid in.

SECTION 6. If any person shall use any of said water taken under this act without the consent of said corporation, or shall wantonly or maliciously divert the water or any part thereof so taken, or corrupt the same, or render it impure, or destroy or injure any dam or aqueduct, pipe, conduit, hydrant, machinery, or other works or property held, owned or used by said corporation, under the authority of and for the purposes of this act, he shall forfeit and pay to said corporation three times the amount of damages assessed therefor, to be recovered in an action of tort; and on conviction of either of the wanton or malicious acts aforesaid may be punished by fine not exceeding three hundred dollars, or by imprisonment in jail not exceeding one year.

SECTION 7. The City of Gloucester shall have the right, at any time during the continuance of the charter hereby granted, to purchase the corporate property and all the rights and privileges of said company, at a price which may be mutually agreed upon between said corporation and the said City of Gloucester; and the said corporation is authorized to make sale of the same to said city. In case said corporation and said city are unable to agree, then the compensation to be paid shall be determined by three commissioners, to be appointed by the supreme judicial court upon application of either party and notice to the other, whose award, when accepted by the court, shall be binding upon both parties. And this authority to purchase said franchise and property is granted on condition that the same
33 is assented to by said city by a two-thirds vote of the voters present and voting thereon at meetings called for that purpose in the several wards of said city.

SECTION 8. For the purposes of defraying the cost of such property, lands, water and water rights as shall be purchased for the purposes aforesaid, the City of Gloucester through its treasurer may from time to time issue notes, bonds, scrip or certificates of debt, to be denominated on the face thereof Gloucester water loan, to any amount not exceeding the amount paid by the city for said purchase, and bearing interest at a rate not exceeding six per centum per annum payable semi-annually, and the principal being payable at periods of not more than thirty years from the issue of said notes, bonds, scrip or certificates of debt, respectively. Said treasurer, under the authority of the city council, may sell such notes, bonds, scrip or certificates of debt, or any part thereof, from time to time, or

pledge the same for any money borrowed for the purposes aforesaid, on such terms and conditions as may be prescribed by the city council, or, in case the city council prescribe no terms and conditions, on such terms and conditions as he may deem proper; and said city shall annually raise by taxation an amount sufficient together with the net income received from rents for the use of said water, to pay the interest on said loans as it accrues; and shall establish at the time of contracting said debt a sinking fund, and contribute thereto from year to year an amount raised by taxation, not exceeding ten thousand dollars in any one year, sufficient with its accumulations to extinguish the debt at maturity; and said sinking fund shall remain inviolate and pledged to the payment of said debt and shall be used for no other purpose.

SECTION 9. In case the City of Gloucester shall purchase the property, rights, privileges and franchises of the corporation established by this act, the said city shall exercise all the rights, powers and authority and be subject to all the restrictions, duties and liabilities herein contained, in such manner and by such officers, servants or agents as said city may direct, and the said city shall be liable to damages for land, water or water rights taken for the purposes set forth in this act which shall not have been previously paid by said corporation.

SECTION 10. This act shall be null and void unless within three years from its passage said corporation shall avail itself of its provisions, and commence a prosecution of the work herein authorized.

SECTION 11. The owners of lands and water rights taken under this act, upon application by either party for an estimate of damages, may require said corporation to give security, satisfactory to the board of aldermen of said city for the payment of all damages and costs which may be awarded to them for the land or other property taken. And if, upon petition of the owner, with notice to the adverse party, the security appears to the aldermen of said city
34 to have become insufficient, they shall require said corporation to give further security to their satisfaction; and all the right or authority of the corporation to enter upon or use said land and other property, except for making surveys, shall be suspended until it gives the security required.

SECTION 12. This act shall take effect upon its passage.

Approved March 31, 1881."

35 EXHIBIT B.

Acts and Resolves of Massachusetts, 1880, *Chap.* 203.

"An act to supply the city of Gloucester with pure water.

Be it enacted, &c., as follows:

SECTION 1. The City of Gloucester is hereby authorized to take, hold and convey into and through said city or any part thereof, the

waters of any springs, natural ponds, brooks or other water sources within its own limits, for the use of said city and the inhabitants thereof, for the extinguishment of fires, creating steam, domestic and other purposes; and may also take and hold, by purchase or otherwise, lands, or estates for the construction of such works as may be necessary therefor; and for laying and maintaining aqueducts or pipes, constructing and maintaining reservoirs or canals, and such other works as may be deemed necessary or proper for conveying, raising, forcing, retaining, distributing or disposing of said water.

SECTION 2. The mayor of said city of Gloucester shall, within sixty days after taking any of the land aforesaid, file in the registry of deeds for the county of Essex, southern district, a description thereof sufficiently accurate for identification.

SECTION 3. Said city for the purposes aforesaid may build aqueducts and maintain the same by any works suitable therefor; may provide and maintain suitable machinery for raising the water above the source of supply; may erect such structures as are necessary for preserving the works; may make and maintain suitable dams and reservoirs, and establish such public fountains and hydrants as are at any time deemed proper, and may change or discontinue the same; may distribute the water throughout said city, regulate its use and establish the rates to be paid therefor. Said city may also for the purposes aforesaid carry its pipes and other works over or under any water course, street, railroad or highway, in such manner as not to obstruct the same; and may do any other acts and things necessary and proper in executing the purposes of this act.

SECTION 4. Said city shall be liable to pay all damages sustained by any person or corporation by taking any land, water, water rights, or property, or by the constructing of any aqueduct, reservoir, or other works for the purposes aforesaid; and if any person or corporation sustaining damages as aforesaid cannot agree with the city upon the amount of said damages, he or it may have them assessed in the same manner as is provided by law with respect to land taken for highways.

36 SECTION 5. For the purpose of defraying the expenses which may be incurred by the city of Gloucester in carrying into effect the powers granted by this act, the city council shall have authority to issue from time to time, notes, scrip, bonds or certificates of debt, to be denominated on the face thereof 'City of Gloucester water loan,' to an amount not exceeding three hundred thousand dollars; the same to bear interest not exceeding the rate of six per cent. per annum, and the principal to be payable at periods not more than thirty years from the issuing of said notes, scrip, bonds or certificates of debt respectively; and the city council may sell the same or any part thereof, from time to time, at public auction or private sale, or pledge the same for money borrowed for the purposes of this act, on such terms and conditions as the city council shall judge proper. The net surplus income and receipts shall be set apart as a sinking fund and applied solely to the payment of the

principal of said loan. The mayor, city treasurer and president of the common council for the time being, shall be trustees of said fund, and shall whenever required by the city council render an account of all their doings in relation thereto. And the city council of said city is hereby authorized, from time to time, to appropriate, grant and assess such sum or sums of money as shall be deemed expedient toward paying the principal of the money so borrowed or obtained, and the interest thereof, in the same manner as money is appropriated, granted and assessed for other city purposes.

SECTION 6. The rights, powers and privileges hereby granted may be exercised by such officers, agents and servants as said city may select or employ, who shall be subject to such ordinances, rules and regulations as the city council may establish, and the mayor shall be eligible to such office.

SECTION 7. If any person shall use any of the said water without the consent of said city, or shall wantonly or maliciously divert the water or any part thereof, of the ponds, springs, streams or sources of water taken or held by said city, pursuant to the provisions of this act, or corrupt the same; or render it impure, or destroy or injure any dam, aqueduct, pipe, conduit, hydrant, machinery or other works or property held, owned or used by said city under the authority and for the purposes of this act, he shall forfeit and pay to said city three times the amount of damages assessed therefor, to be recovered in an action of tort; and on conviction of either of the wanton or malicious acts aforesaid may also be punished by fine not exceeding three hundred dollars, or by imprisonment in jail not exceeding one year.

SECTION 8. This act shall take effect upon its passage, and shall become void unless accepted by two-thirds of the legal voters of the city of Gloucester, present and voting thereon, at a legal meeting which shall be called in their several ward rooms for that purpose by the mayor and aldermen of said city, within six months from the passage of this act, at which meeting the check list shall be used.

Approved April 17, 1880."

37 EXHIBIT C.

Form of Water Contract.

Adopted by city council Sept. 28th, 1886.

Ratified Oct. 19, 1886. 883 yes, 205 no.

This indenture, made and concluded this twenty-eighth day of September, A. D. 1886, by and between the Gloucester Water Supply Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts, of the first part, and the City of Gloucester, a municipal corporation existing under the laws of said Commonwealth, of the second part

Witnesseth, that whereas, said company, the party of the first part, has constructed works and laid pipes, through which from a reservoir on "Bond's hill" so called, in said city, it has introduced water into the streets of said city, and whereas the said city, the party of the second part, is desirous that its citizens should have the best possible protection against fire,—

Now know all men by these presents, that said Gloucester Water Supply Company, the party of the first part, agrees with said City of Gloucester, the party of the second part, as follows, viz.—

That said company shall furnish said city water for fire purposes for a period of ten years, as hereinafter provided, unless sooner terminated by the purchase of said company's property and franchises by said city, in accordance with section seven of chapter one hundred and sixty-seven of the Acts of the Year Eighteen hundred and eighty-one of said Commonwealth.

38 And that said company will furnish for the purpose aforesaid to said city and set forty first class three-nozzle post fire hydrants, such as the city council may determine, all to be connected with the main pipes and supplied with water therefrom, the connecting pipe in every case to be not less than five inches in diameter; such hydrant or hydrants to be placed in such localities and streets as may be selected by the city council of said city or by such committees or agents as said city council may appoint.

Also that said company will maintain at all times an ample supply of water in its reservoir aforesaid on "Bond's hill" and conduct therefrom a supply of water of the full capacity of the main pipes to and for all hydrants furnished under this agreement, so that all hydrants so furnished shall be constantly supplied with sufficient water at all times for fire purposes excepting in such sections as it may be absolutely necessary to cut off the same temporarily for repairs or extensions, and then the supply of water shall be so cut off only during the continuance of such necessity, and after due notice to the chief engineer of the fire department of said city, or in case of his death, absence or inability to the officer supplying his place.

And in consideration of the party of the first part performing faithfully each and all of its agreements herein contained, the party of the second part will pay to said party of the first part in semi-annual payments the sum of sixty dollars ($60) yearly for each and every hydrant set by said company for said city as aforesaid and for

39 the use of water therefrom, and said sums so reckoned shall be in full payment and satisfaction for the use of said company's water and hydrants by said city, and for the performance by said company of each and all of said company's agreements herein contained; and it is agreed that said term of years shall begin at soon as the hydrant or hydrants ordered and located are set and a test of the efficiency of the same and the water supply is given satisfactory to the city council of said city or to persons by it designated. The location of each hydrant shall be made and ordered by the party of the second part previous to the setting thereof by the

party of the first part, who shall proceed to set them as fast as they are ordered and located.

It is further agreed that in case said city shall during the existence of this contract locate one hundred hydrants, the cost thereof thereafter to said city, being the amount to be paid said company as aforesaid, shall not exceed the sum of fifty dollars ($50) yearly for each hydrant.

It is further agreed that said party of the second part shall on all reasonalbe occasions have the right to use any hydrants furnished under this contract for the purpose of testing the same or the fire apparatus owned or used by said city without any unnecessary waste of water or power and without extra charge therefor.

All hydrants are to be furnished and set by and at the expense of said company, under the direction of said city or its agents, and said company further agrees that it will keep and maintain said hydrants in good order and repair at all times for the use of said city during the said period.

40 It is also agreed that in case the party of the second part shall determine to discontinue the use of any hydrant which may be located under this contract, such hydrant shall be removed at the expense of said city, the charge or payment therefor thereafter to cease.

And inasmuch as the purpose of this contract in providing for a supply of water for the extinguishment of fire is the protection of the property of individuals as well as of the municipality, and as the payments to be made under this contract are to be raised in part or wholly by taxation upon such property, it is expressly understood and agreed by and between the parties hereto that the said party of the second part acts herein not only as the representative of the municipality, but in behalf of the individual property owners in said city, and that any owner of property in the said city who shall sustain damage by reason of the failure of the party of the first part to fulfil the terms of this contract which are to be observed and performed by said party of the first part (unless said failure is caused by act of God or unavoidable casualty) shall have the same right of action and the same remedies against said company as if said contract were made by and between said party of the first part and said property owner in his own name.

Provided, however, that this contract shall be of no force and effect until the same has been assented to by said city by a majority vote of all the voters thereof present and voting thereon at a legal meeting called for that purpose as provided in section four of chapter one hundred and sixty-seven of the Acts of the Year Eighteen hundred and eighty-one.

41 In witness whereof, the said City of Gloucester, by its mayor hereto duly authorized, and the Gloucester Water Supply Company by its treasurer thereto duly authorized, have caused these presents to be subscribed in their names and behalf, and the said

company has caused the same to be countersigned by its president the day and year first above written.

(Signed) GLOUCESTER WATER SUPPLY COMPANY,
By Its Treasurer, Duly Authorized.
G. NORMAN WEAVER. [SEAL.]
J. O. PROCTOR, *President.*

(") CITY OF GLOUCESTER,
By Its Mayor.

42 EXHIBIT D.

Acts and Resolves of Massachusetts, 1887, *Chapter* 288.

An act to amend the charter of the Gloucester Water Supply Company.

Be it enacted, etc., as follows:

SECTION 1. Section four of chapter one hundred and sixty-seven of the Acts of the Year Eighteen hundred and eighty-one is hereby amended by adding at the end of said section the following words.— or at any regular municipal election; and the warrant for notifying such meetings if called specially as aforesaid shall specify when the polls shall be opened for the purpose of voting and when they shall be closed.

SECTION 2. This act shall take effect upon its passage.

Approved May 19, 1887.

43 EXHIBIT E.

Contract No. 2.

Form of Contract.

Between the Gloucester Water Supply Company and the City of Gloucester; accepted by the city council July 12, 1887, subject to ratification of the people on Tuesday, August 9th, 1887, and ratified 387 to 240.

This indenture, made and concluded this fifteenth day of July, 1887, by and between the Gloucester Water Supply Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts, of the first part, and the City of Gloucester, a municipal corporation existing under the laws of said Commonwealth, of the second part, witnesseth.—

That whereas said company, the party of the first part, has constructed works and laid pipes, through which, from a reservoir on "Bond's hill" so called, in said city, it has introduced water into

the streets of said city, and whereas the said city, the party of the second part, is desirous that its citizens should have the best possible protection against fire, and to that end, desirous that the former contract between the parties be expanded and enlarged.

Now, therefore, know all men by these presents, that said Gloucester Water Supply Company, the party of the first part, agrees with said City of Gloucester, the party of the second part, as follows, viz.—

The said company will furnish said city of Gloucester
44 water for fire purposes for the balance of the period of ten years, already agreed upon by indenture between said parties, dated the twenty-eighth day of September, eighteen hundred and eighty-six, as hereinafter provided, unless sooner terminated by the purchase of said company's property and franchises by said city, in accordances with section seven of chapter one hundred and sixty-seven of the Acts of the Year Eighteen hundred and eighty-one of said Commonwealth.

And that said company will furnish during said period for the purpose aforesaid to said city, and set and maintain one hundred first-class three-nozzle post fire hydrants, such as the city council may determine, in addition to the forty hydrants already contracted for by said former indenture, which shall also be maintained in accordance with the terms of this present indenture, all to be connected with the main pipes and supplied with water therefrom, the connecting pipe in every case to be not less than five inches in diameter; such hydrants or any hydrant set under the former contract to be placed in such localities and streets as may be selected by the city council of said city, or by such committee or agents as said city council may appoint.

Also that said company will maintain at all times an ample supply of water in its reservoir aforesaid on "Bond's hill" and conduct therefrom a supply of water of the full capacity of the main pipes to and from all hydrants furnished under this or the former agreement, between the parties hereto so that all hydrants so furnished shall be constantly supplied with sufficient water at all times for fire

purposes, excepting in such sections as it may be absolutely
45 necessary to cut off the same temporarily for repairs or extensions, and then the supply of water shall be cut off the same temporarily for repairs or extensions, and then the supply of water shall be cut off only during the continuance of such necessity and after due notice to the chief engineer of the fire department of said city, or in case of his death, absence or inability, to the officer supplying his place.

And in consideration of the party of the first part performing faithfully each and all of its agreements herein contained, the party of the second part will pay to said party of the first part in semi-annual payments, the sum of fifty dollars ($50) yearly, for each and every hydrant set by said company for said city as aforesaid, whether under this or the former agreement between said parties, and for the use of water from all such hydrants, until the number of hydrants

located and set in manner herein specified shall exceed one hundred, including the forty contracted for by said former indenture, and thereafter the amount to be paid by said city for each hydrant in excess of said one hundred, and for the use of water therefrom as herein specified, shall be at the rate of forty dollars ($40) yearly; and said sums so reckoned shall be in full payment and satisfaction for the use of said company's water and hydrants by said city, and for the performance by said company of each and all of said company's agreements herein contained; and it is agreed that said term of years shall be reckoned as in the former indenture, dated September twenty-eighth, eighteen hundred and eighty-six, and that the charge or payment for each hydrant to be set as aforesaid, shall begin as soon as such hydrant has been ordered by the city council or its agents, and a test of the efficiency of the same and the
46 water supply is given satisfactory to the city council of said city, or to persons by it designated.

The location of each hydrant shall be made and ordered by the party of the second part previous to the setting thereof by the party of the first part, who shall proceed to set them as fast as they are ordered and located.

It is further agreed that said party of the second part shall, on all reasonable occasions, have the right to use any hydrant furnished under this or the former contract, for the purpose of testing the same, or the fire apparatus owned or used by said city, without any unnecessary waste of water or power, and without extra charge therefor.

All hydrants are to be furnished and set by and at the expense of said company under the direction of said city or its agents, and said company further agrees that it will keep and maintain said hydrants, and all hydrants furnished said city as aforesaid, whether under this or the former contract between the parties in good order and repair at all times, for the use of said city during the said period.

It is also agreed, that in case the party of the second part shall determine to discontinue the use of any hydrant which may be located under this or the former contract by indenture of September twenty-eighth, eighteen hundred and eighty-six, such hydrants shall be removed at the expense of said city, the charge or payment therefor thereafter to cease.

It is further agreed, that if at any time during the term of years of said contract said city shall purchase or otherwise obtain,
47 set and maintain a suitable lighted fountain apparatus, within the limits of said city in such place as the city council shall determine, said water company will on its part provide water to supply the same during the whole of said term of years, but only during all non-freezing months, free of charge and without additional expense.

It is further agreed between the parties hereto, that if said city shall, during the existence of this agreement, set a public drinking fountain (with suitable arrangements for cooling water) within the limits of said city, in such place as the city council may determine,

the said company will, immediately upon the setting of such fountain, with suitable arrangements for cooling water, furnish all the water that may be needed therefor free of charge for the period of one year from the setting thereof.

And, inasmuch as the purpose of this contract in providing for a supply of water for the extinguishment of fire, is for the protection of the property of individuals as well as of the municipality, and as the payments to be made under this contract are to be raised in part or wholly by taxation upon such property, it is expressly understood and agreed by and between the parties hereto, that the party of the second part acts herein, not only as the representative of the municipality, but in behalf of the individual property owners in said city, and that any owners of property in the said city who shall sustain damage by reason of the failure of the party of the first part to fulfill the terms of this contract which are to be observed and performed by said party of the first part (unless said failure is
48 caused by act of God or unavoidable casualty,) shall have the same right of action and the same remedies against said company as if said contract were made by and between said party of the first part and the said property owner in his own name.

It is agreed, that the contract between the parties hereto, dated September twenty-eighth, eighteen hundred and eighty-six, shall, upon the execution of this contract and its ratification by vote as hereinafter set forth, be thereupon and thereby annulled, that except where express reference is herein had to said contract by indenture dated the twenty-eighth day of September, eighteen hundred and eighty-six, said last named contract may be used for the purpose of explaining this instrument; but nothing herein contained shall be construed to mean that said water company shall be released from its obligation, already incurred in regard to the forty hydrants heretofore contracted for by said city, but the same shall be furnished and maintained by said water company, in accordance with the terms of this indenture, the rate or charge for such hydrants being altered agreeably thereto.

Provided however, that this contract shall be of no force and effect until the same has been assented to by said city by a majority vote of all the voters thereof present and voting thereon at a legal meeting called for that purpose as provided in section four of chapter one hundred and sixty-seven of the acts of the year eighteen hundred and eighty-one and amendments thereof.

In witness whereof, the said City of Gloucester, by its mayor hereto duly authorized, and the Gloucester Water Supply Company by its treasurer thereto duly authorized, have caused these
49 presents to be subscribed in their names and behalf by and their respective corporate seals to be hereto affixed, and the

said company has caused the same to be countersigned by its president, the day and year first above written.

[SEAL] (Signed) CITY OF GLOUCESTER,
By DAVID I. ROBINSON,
Mayor of City of Gloucester.

[SEAL.] " G. NORMAN WEAVER,
Treasurer Gloucester Water Supply Co.

" JOSEPH O. PROCTOR,
President of Gloucester Water Supply Co.

50 EXHIBIT F.

GLOUCESTER, *March 3d*, 1893.

To the honorable the senate and house of representatives.

GENTLEMEN: The undersigned members of the board of aldermen of the city of Gloucester, respectfully petition your honorable body for the passage of an act authorizing the City of Gloucester to construct within its borders a system of water works for the extinguishment of fires, and for mechanical, domestic and other purposes, and to take the water of any springs, natural ponds, brooks or other water source (not otherwise granted) and to hold and convey the same through the said city of Gloucester or any part thereof, in accordance with the draft of a bill to be hereafter submitted in aid of this petition.

(Signed) JAMES W. THOMAS,
" WM. F. MOORE,
" HENRY S. McCULLOCH,
" HENRY P. DENNEN,
" B. FRANK ELLERY,
" G. H. MORTON,
Board of Aldermen, City of Gloucester, Mass.

51

Exhibit G.

House No. 625.

House of Representatives, *March* 13, 1893.

(Bill accompanying the petition of the board of aldermen of Gloucester, that said city may be authorized to construct a system of water supply for said city for fire, domestic and manufacturing purposes.)

Commonwealth of Massachusetts.

In the year one thousand eight hundred and ninety-four.

An act to supply the city of Gloucester with pure water.

Be it enacted by the senate and house of representatives in general court assembled, and by the authority of the same, as follows:

Section 1. The City of Gloucester may supply itself and its inhabitants with water for the extinguishment of fires and for domestic, manufacturing and other purposes, and may establish fountains and hydrants, relocate or discontinue the same, may regulate the use of such water and fix and collect rates to be paid for the use of the same.

Section 2. The said city for the purpose aforesaid, may take by purchase or otherwise and hold the waters of any pond, stream, spring or wells within the limits of said city, also Chebacco lake in the towns of Essex, Wenham and Hamilton, and the water rights connected therewith, and obtain and take water by means of bored, driven, artesian or other wells on any land within said city, and hold and convey said water through said city and through said towns of Essex, Wenham and Hamilton from said lake, and may also take and hold, by purchase or otherwise, all lands, rights of way and easements necessary for holding and preserving such water, and for conveying the same to any part of said city of
52 Gloucester; and may erect on the lands thus taken or held, proper dams, buildings, fixtures and other structures, and may make excavations, procure and operate machinery and provide such other means and appliances as may be necessary for the establishment and maintenance of complete and effective water works; and may construct and lay down conduits, pipes and other works under or over any lands, water courses, railroads or public or private ways, and along any such way in such manner as not unnecessarily to obstruct the same; and for the purpose of constructing, maintaining and repairing such conduits, pipes and other works, and for all proper purposes of this act, said city may dig up any such lands, and under the direction of the board of selectmen of any town in which said ways are situated, may enter upon and dig up any such ways

in such manner as to cause the least hindrance to public travel on such ways.

The title to all land within said city of Gloucester, taken or purchased under the provisions of this act, shall vest in said city, and the land taken may be managed, improved and controlled by the board of water commissioners hereinafter provided for, in such manner as they shall deem for the best interests of said city.

SECTION 3. Said city shall, within ninety days after the taking of any lands, rights of way, water rights, water sources or easements as aforesaid, otherwise than by purchase, file and cause to be recorded in the registry of deeds for the southern district for said county of Essex, a description thereof sufficiently accurate for identification, with a statement of the purpose for which the same were taken, signed by the water commissioners hereinafter provided for.

SECTION 4. Said city shall pay all damages sustained by any person or corporation in property, by the taking of any lands, right of way, water, water sources, water rights or easements, or by any other thing done by said city under the authority of this act. Any person or corporation sustaining damages as aforesaid under this act, who fails to agree with said city as to the amount of damages sustained, may have the damages assessed and determined in the manner provided by law when land is taken for the laying out of highways on application at any time within the period of two years from the taking of such land or other property or the doing of other injury under the authority of this act; but no such application shall be made after the expiration of said two years. No application for the assessment of damages shall be made for the taking of any water, water right, or for any injury thereto, until the water is actually withdrawn or diverted by said city under the authority of this act.

SECTION 5. In every case of a petition to the superior court for an assessment of damages, the city may tender to the complainant or his attorney any sum or may bring the same into court to be paid to the complainant for the damages by him sustained or claimed in his petition, or may in writing offer to be defaulted and that
53 damages may be awarded against it for the sum therein expressed and if the complainant does not accept such sum, with his costs up to that time, but proceeds in his suit, and does not recover greater damages than were so offered or tendered, not including interest on the sum recovered in damages, from the date of such offer or tender, the city shall have judgment for its costs, after said date for which execution shall issue, and the complainant, if he recovers damages shall be allowed his costs only to the date of such offer or tender.

SECTION 6. The said city may, for the purpose of paying the necessary expenses and liabilities incurred under the provisions of this act, issue from time to time bonds, notes or scrip, to an amount not exceeding in the aggregate, four hundred thousand dollars; such bonds, notes or scrip shall bear on their face the words "City of Gloucester water loan," shall be payable at the expiration of periods not exceeding thirty years from the date of issue, shall bear

interest payable semi-annually at a rate not exceeding six per centum per annum, and shall be signed by the treasurer of the city and be countersigned by the water commissioners hereinafter provided for. The said city may sell such securities at public or private sale, or pledge the same for money borrowed for the purpose of this act upon such terms and conditions as it may deem proper; *Provided*, That such securities shall not be sold for less than the par value thereof. The said city shall provide, at the time of contracting said loan, for the establishment of a sinking fund and shall annually contribute to such fund a sum sufficient, with the accumulations thereof, to pay the principal of such loan at maturity. The said sinking fund shall remain inviolate and pledged to the payment of said loan and shall be used for no other purpose.

SECTION 7. The said city, instead of establishing a sinking fund, may, at the time of authorizing said loan, provide for the payment thereof in such annual proportionate payments as will extinguish the same within the time prescribed in this act; and when such vote has been passed, the amount required thereby shall, without further vote, be assessed by the assessors of said city in each year thereafter until the debt incurred by said loan shall be extinguished, in the same manner as other taxes are assessed under the provisions of section thirty-four of chapter eleven of the Public Statutes.

SECTION 8. The return required by section ninety-one of chapter eleven of the Public Statutes shall state the amount of any sinking fund established under this act, and if none is established, whether action has been taken in accordance with the provisions of the preceding section and the amounts raised and applied thereunder for the current year.

SECTION 9. The said city shall raise annually by taxation a sum which, with the income derived from water rates will be sufficient to pay the current annual expenses of operating its water works, and the interest as it accrues on the notes, bonds and scrip issued as aforesaid by said city, and to make such contributions to
54 the sinking fund and payments on the principal as may be required under the provisions of this act.

SECTION 10. Whoever shall use any water taken under this act without the consent of said city or shall wilfully or wantonly corrupt, pollute or divert any of the waters taken or held by said city pursuant to the provisions of this act, or destroy or injure any structure, work or other property owned, held or used by said city under the authority and for the purposes of this act, shall forfeit and pay to said city three times the amount of damages assessed therefor, to be recovered in an action of tort, and upon conviction of either of the above wilful or wanton acts shall also be punished by a fine not exceeding three hundred dollars or by imprisonment not exceeding one year.

SECTION 11. The occupant of any tenement shall be liable for the payment of the rent for the use of water in such tenement, and the owner shall also be liable in case of the non-payment by the occu-

pant, for all sums due for the use of water under this act, to be collected in an action of contract in the name of the City of Gloucester.

SECTION 12. The powers and duties granted to and imposed upon the City of Gloucester by this act shall be exercised by a board of water commissioners, consisting of five residents of the city, to be appointed by the mayor with the approval of the city council. Said commissioners shall be appointed and hold their office from the time of their appointment and approval for the terms of one, two, three, four and five years respectively, from the first Monday of February next following their appointment, and thereafter one commissioner shall be appointed each year, for the term of five years from the first Monday of February; all such commissioners, except in case of removal, shall hold office until their successors are appointed in their stead; vacancies occurring during the term may be filled for the remainder of the term. No person shall be appointed commissioner who holds at the time any city office by popular election. Any commissioner, after due notice and hearing, may be removed at any time by a two-thirds vote of each branch of the city council for any cause which shall be deemed sufficient and shall be expressed in the vote of removal. The commissioners shall receive such compensation for their services as the city council, by a two-thirds — of each branch thereof, shall determine.

SECTION 13. The said commissioners shall superintend and direct the construction, execution and performance of all the works, matters and things mentioned in the preceding sections; they shall be subject to such ordinances, rules and regulations in the execution of such duties as the city council may from time to time ordain and establish, not inconsistent with the provisions of this act and the laws of this Commonwealth. Said water commissioners shall make all contracts for the above purpose in the name and behalf of the city, but no contract shall be made by them which involves the expenditure of money not already appropriated for the purpose by the city council of said Gloucester. A majority of said commissioners shall be a quorum for the exercise of the powers and the performance of the duties of the commission.

SECTION 14. The water commissioners shall fix such prices or rents for the use of water, as shall produce annually as near as may be a net surplus equal to two per centum of the total amount of the bonds, notes or scrip, issued under this act, after paying all current expenses of operating the water works, and interest upon loans, and after payment of all expense for new construction, not exceeding ten thousand dollars in any one year.

The commissioners of sinking funds of the city of Gloucester shall be trustees of the sinking fund which shall be set apart for the payment and redemption of said water loan and which shall remain inviolate and pledged to the payment of said loan and shall be used for no other purpose. The net surplus aforesaid, shall be paid into the sinking fund, and if said surplus does not equal two per centum of the total amount of the bonds, note and scrip issued under this act, the city shall raise by general taxation a sum which, with the

surplus shall equal said two per centum, and shall contribute said sum to the sinking fund.

Said commissioners shall annually and as often as the city council may require, render an account of all their doings in relation to the sinking fund and shall be governed by the provisions of section eleven of chapter twenty-nine of the Public Statutes, except as herein otherwise provided.

SECTION 15. This act shall be submitted to the qualified voters of the city of Gloucester for its acceptance and shall be void unless such voters, voting in their respective wards and precinct at a legal meeting called by order of the city council, in the same manner as meetings for municipal elections are called, shall within three years from the passage of this act, determine by ballot, by a two-thirds — of those present and voting, to accept the same.

SECTION 16. So much of this act as authorizes the submission of the question of its acceptance to the legal voters of said city, shall take effect upon its passage, but it shall not take further effect unless and until accepted, as hereinbefore provided, by the qualified voters of said city, and the number of meetings called for the purpose of this acceptance shall not exceed three in any one year.

56

EXHIBIT H.

GLOUCESTER, MASS., *November* 20, 1894.

To the honorable the senate and house of representatives in general court assembled:

The undersigned, mayor of the city of Gloucester, by order of the city council, respectfully petitions your honorable body for the passage of an act, authorizing the City of Gloucester to acquire and maintain a water supply for the extinguishment of fires, and for mechanical, domestic and other purposes for the city and its inhabitants, and to acquire therefor the waters of any springs, ponds, lakes, brooks, or other water sources, and especially of the Chebacco lakes in the towns of Essex, Wenham and Hamilton, and to hold and convey the same into and through said towns of Essex, Wenham and Hamilton, supplying said town of Essex and its inhabitants with water, if desired, and into and throughout the city of Gloucester, or any part thereof, and for all rights and privileges necessarily or properly incidental to the subject of this petition.

(Signed) BENJ. F. COOK,
Mayor of the City of Gloucester.

57 EXHIBIT I.

House No. 380.

(Bill accompanying petition of the mayor of Gloucester. Water supply.)

COMMONWEALTH OF MASSACHUSETTS.

In the year one thousand eight hundred and ninety-five.

An act to supply the city of Gloucester with pure water.

Be it enacted by the senate and house of representatives in general court assembled, and by the authority of the same, as follows.—

SECTION 1. The City of Gloucester may supply itself and its inhabitants with water for the extinguishment of fires, and for domestic, manufacturing and other purposes; and may establish fountains and hydrants, relocate or discontinue the same, may regulate the use of such water and fix and collect rates to be paid for the use of the same.

SECTION 2. The said city, for the purposes aforesaid, may take, by purchase or otherwise, and hold the waters of any pond, stream, spring or wells not heretofore taken or purchased by the Gloucester Water Supply Company, within the limits of said city, also the Chebacco lakes in the towns of Essex, Wenham and Hamilton, and the waters which flow into the same and the water rights connected therewith, and obtain and take water by means of bored, driven, artesian or other wells on any land within said city, and hold and convey said water through said city and through said towns of Essex, Wenham and Hamilton from said lakes, and may also take and hold, by purchase or otherwise, all lands, rights of way and easements necessary for holding, storing, purifying and preserving such water and for conveying the same to any part of said city of Gloucester; and may erect, on the lands thus taken or held, proper dams, reservoirs, buildings, fixtures and other structures, and may make excavations, procure and operate machinery and provide such other means and appliances as may be necessary for the establishment and maintenance of complete and effective water works; and

58 may construct and lay down conduits, pipes and other works, under or over any lands, water-courses, railroads, or public or private ways, and along any such way in such manner as not unnecessarily to obstruct the same; and for the purpose of constructing, maintaining and repairing such conduits, pipes and other works, and for all proper purposes of this act, said city may dig up any such lands, and, under the direction of the board of selectmen of any town in which said ways are situated, may enter upon and dig

up any such ways in such manner as to cause the least hindrance to public travel on such ways.

The title to all land taken or purchased under the provisions of this act shall vest in said city, and the land so taken may be managed, improved and controlled by the board of water commissioners hereinafter provided for, in such manner as they shall deem for the best interests of said city.

SECTION 3. Said city shall within ninety days after the taking of any lands, rights of way, water rights, water sources or easements as aforesaid, otherwise than by purchase, file and cause to be recorded in the registry of deeds for the southern district for said county of Essex a description thereof sufficiently accurate for identification, with a statement of the purpose for which the same were taken, signed by the water commissioners hereinafter provided for.

SECTION 4. Said city shall pay all damages sustained by any person or corporation in property by the taking of any lands, right of way, water, water sources, water rights or easement, or by any other thing done by said city under the authority of this act, except that said city shall not be liable to pay any damage resulting from taking water from the said Chebacco lakes other than the Commonwealth itself would be legally liable to pay. Any person or corporation sustaining damages as aforesaid under this act who fails to agree with said city as to the amount of damages sustained, may have the damages assessed and determined in the manner provided by law when land is taken for the laying out of highways, on making application at any time within the period of two years from the taking of such land or other property, or the doing of other injury, under the authority of this act; but no such application shall be made after the expiration of said two years. No application for the assessment of damages shall be made for the taking of any water, water right, or for any injury thereto, until the water is actually withdrawn or diverted by said city under the authority of this act.

Said city shall pay all damages sustained under the authority of this act by the town of Essex in its alewife fishery, which, unless agreed upon, shall be assessed and determined in the manner hereinbefore provided; *provided, however*, that said city may construct and maintain suitable fishways for the preservation of said alewife fishery.

SECTION 5. In every case of a petition to the superior court for an assessment of damages the city may tender to the complainant or his attorney any sum, or may bring the same into court to be paid
to the complainant for the damages by him sustained or
59 claimed in his petition, or may in writing offer to be defaulted
and that damages may be awarded against it for the sum therein expressed, and if the complainant does not accept such sum, with his costs up to that time, but proceeds in his suit, and does not recover greater damages than were so offered or tendered, not including interest on the sum recovered in damages from the date of such offer or tender, the city shall have judgment for its costs after said date for which execution shall issue, and the complainant, if he

recovers damages, shall be allowed his costs only to the date of such offer or tender.

SECTION 6. The said city may, for the purpose of paying the necessary expenses and liabilities incurred under the provisions of this act, issue from time to time bonds, notes or scrip, to an amount sufficient for such purpose, to be determined by the board of water commissioners hereinafter provided for; such bonds, notes or scrip shall bear on their face the words "City of Gloucester water loan," and shall be payable at the expiration of periods not exceeding thirty years from the date of issue, shall bear interest, payable semi-annually, at a rate not exceeding six per centum per annum, and shall be signed by the treasurer of the city, and be countersigned by the water commissioners hereinafter provided for. The said city may sell such securities at public or private sale, or pledge the same for money borrowed for the purposes of this act, and upon such terms and conditions as it may deem proper; *provided*, that such securities shall not be sold for less than the par value thereof. The said city shall provide at the time of contracting said loan for the establishment of a sinking fund, and shall annually contribute to such fund a sum sufficient with the accumulations thereof to pay the principal of such loan at maturity. The said sinking fund shall remain inviolate and pledged to the payment of said loan, and shall be used for no other purpose.

SECTION 7. The said city instead of establishing a sinking fund, may, at the time of authorizing said loan, provide for the payment thereof in such annual proportionate payments as will extinguish the same within the time prescribed in this act; and when such vote has been passed the amount required thereby shall without further vote be assessed by the assessors of said city in each year thereafter until the debt incurred by said loan shall be extinguished, in the same manner as other taxes are assessed under the provisions of section thirty-four of chapter eleven of the Public Statutes.

SECTION 8. The return required by section ninety-one of chapter eleven of the Public Statutes shall state the amount of any sinking fund established under this act, and if none is established, whether action has been taken in accordance with the provisions of the preceding section, and the amounts raised and applied thereunder for the current year.

SECTION 9. The said city shall raise annually by taxation a sum which, with the income derived from water rates, will be sufficient to pay the current annual expenses of operating its water works, and the interest as it accrues on the notes, bonds, and scrip issued as aforesaid by said city, and such contributions to the sinking fund and payments on the principal as may be required under the provisions of this act.

SECTION 10. Whoever shall use any water taken under this act without the consent of said city, or shall wilfully or wantonly corrupt, pollute or divert any of the waters taken or held by said city pursuant to the provisions of this act, or destroy or injure any structure, work or other property owned, held or used by said city

under the authority and for the purposes of this act, shall forfeit and pay to said city three times the amount of damages assessed therefor, to be recovered in an action of tort; and upon conviction of either of the above wilful or wanton acts shall also be punished by a fine not exceeding three hundred dollars or by imprisonment not exceeding one year.

SECTION 11. The occupant of any tenement shall be liable for the payment of the rent for the use of water in such tenement, and the owner shall also be liable, in case of non-payment by the occupant, for all sums due for the use of water under this act, to be collected in an action of contract in the name of the City of Gloucester.

SECTION 12. The powers and duties granted — and imposed upon the City of Gloucester by this act, including the purchase or taking of any lands or other property or rights, shall be exercised by a board of water commissioners, consisting of three residents of the city, to be appointed by the mayor, with the approval of the city council. Said commissioners shall be appointed and hold their office from the time of their appointment and approval, for the terms of one, two and three years, respectively, from the first Monday of February next following their appointment, and thereafter one commissioner shall be appointed each year for the term of three years from the first Monday in February; all such commissioners, except in case of removal, shall hold office until their successors are appointed in their stead; vacancies occurring during the term may be filled for the remainder of the term. No person shall be appointed commissioner who holds at the time any city office by popular election. Any commissioner, after due notice and hearing, may be removed at any time by a two-thirds vote of each branch of the city council for any cause which shall be deemed sufficient and shall be expressed in the vote of removal. The commissioners shall receive such compensation for their services as the city council, by a two-thirds vote of each branch thereof, shall determine.

SECTION 13. The said commissioners shall superintend and direct the construction, execution and performance of all the works, matters and things mentioned in the preceding sections; they shall be subject to such ordinances, rules and regulations in the execution of such duties as the city council may from time to time ordain and establish, not inconsistent with the provisions of this act and the laws of this Commonwealth. Said water commissioners shall
61 make all contracts for the above purpose in the name and behalf of the city, but no contracts shall be made by them which involves the expenditure of money not already appropriated for the purpose by the city council of said Gloucester. A majority of said commissioners shall be a quorum for the exercise of the powers and the performance of the duties of the commission.

SECTION 14. The water commissioners shall fix such prices or rents for the use of water as shall produce annually as near as may be a net surplus over operating expenses and interest charges equal to two per centum of the total amount of the bonds, notes or scrip issued under this act, after paying all current expenses of operating the water

works and interest upon loans, and after payment of all expense for new construction not exceeding ten thousand dollars in any one year after the original construction.

The commissioners of sinking funds of the city of Gloucester shall be trustees of the sinking fund which shall be set apart for the payment and redemption of said water loan, and which shall remain inviolate and pledged to the payment of said loan and shall be used for no other purpose. The net surplus aforesaid shall be paid into the sinking fund, if any is established hereunder, and if said surplus does not equal two per centum of the total amount of the bonds, notes and scrip issued under this act, the city shall raise by general taxation a sum which, with the surplus, shall equal said two per centum, and shall contribute said sum to the sinking fund.

Said commissioners shall annually, and as often as the city council may require, render an account of all their doings in relation to the sinking fund, and shall be governed by the provisions of section eleven of chapter twenty-nine of the Public Statutes, except as herein otherwise provided.

SECTION 15. The said town of Essex may connect water pipes with the main pipe of the city of Gloucester in said town, such connection to be made to the satisfaction and approval of the engineer of said city, and in such case said city shall furnish to the inhabitants of said town through the pipes so connected a supply of water for the extinguishment of fires and for domestic and other purposes, for which said town of Essex shall pay said city an equitable compensation, which, in case of disagreement, shall be determined by three commissioners to be appointed by the supreme judicial court upon application of either party and notice to the other, whose award, when accepted by said court, shall be binding upon the parties for the term of five years. And nothing in this act shall be construed to prevent the said towns of Essex, Wenham and Hamilton from supplying themselves with water from the said Chebacco lakes for fire, domestic and other purposes.

SECTION 16. If within thirty days after this act shall have been accepted by the City of Gloucester as hereinafter provided, the Gloucester Water Supply Company shall notify the mayor of the city of Gloucester in writing that it desires to sell to said city all the rights privileges, easements, lands, waters, water-rights, dams, reser-
62 voirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water, and shall file with the city clerk of said city a specification and description thereof, said city shall not proceed to supply water to itself or its inhabitants under the authority of this act, unless it shall have first purchased of said company the property aforesaid; and said company is authorized to make sale of said property to said city and said city is authorized to purchase the same, and manage and use the property thus conveyed for the purposes and under the provisions of this act. Whenever said city

shall by a majority vote of the legal voters of said city, present and voting thereon at a legal meeting called for that purpose, by order of the city council, or at any regular municipal election, vote to purchase said property, notice of the desire of said company to sell the same having been given as hereinbefore provided, said property shall thereupon become the property of said city, and said city shall pay to said company the fair value thereof, to be ascertained as hereinafter provided.

In case the said city and the said company, after conference thereon, shall be unable to agree upon the value of said property the supreme judicial court shall, upon application of either party, and notice to the other, appoint three commissioners, one of whom shall be learned in the law and one a skilled engineer, who shall determine the fair value of said property for the purposes of its use by said city, and whose award, unless application shall be made for a jury as hereinafter provided, shall be final when accepted by the court. Such value shall be estimated without enhancement on account of future earning capacity, or good will, or on account of the franchise of said company. Either party feeling aggrieved by the award of said commissioners may within thirty days next after the filing of the same in court, make application in writing to have the value of said property determined by a jury; and thereupon a trial may be had at the bar of said court in the same manner as other civil cases are there tried by jury; if upon the trial the jury, under the rule above prescribed, find the value of said property to be more than the amount awarded by said commissioners, said Gloucester Water Supply Company shall recover its costs; otherwise said city shall recover its costs, and such costs shall be taxed as in civil cases.

SECTION 17. This act shall be submitted to the qualified voters of the city of Gloucester for its acceptance and shall be void unless such voters, voting in their respective wards and precincts at a legal meeting called for that purpose by order of the city council in the same manner as meetings for municipal elections are called, or at any regular municipal election, shall, within three years from the passage of this act, determine by ballot by a majority vote of those present and voting thereon to accept the same. The warrant for notifying such meeting, if called specially as aforesaid, shall specify when the polls shall be opened for the purpose of voting and when they shall be closed.

SECTION 18. So much of this act as authorizes the submission of the question of its acceptance to the legal voters of
63 said city shall take effect upon its passage, but it shall not take further effect unless and until accepted, as hereinbefore provided, by the qualified voters of said city, and the number of meetings called for the purpose of this acceptance shall not exceed three in any one year.

64 EXHIBIT J.

Senate No. 281.

(Mr. Smith gives notice that he will move to substitute this bill for the report of the committee on water supply, leave to withdraw, on the petitions of the board of aldermen and others of the city of Gloucester that said city may be authorized to construct and maintain a system of water supply (accompanied by house bill No. 625.)

COMMONWEALTH OF MASSACHUSETTS.

In the year one thousand eight hundred and ninety-four.

An act to supply the city of Gloucester with pure water.

Be it enacted by the senate and house of representatives in general court assembled, and by the authority of the same, as follows.—

SECTION 1. The City of Gloucester may supply itself and its inhabitants with water for the extinguishment of fires and for domestic, manufacturing and other purposes; and may establish fountains and hydrants, relocate or discontinue the same, may regulate the use of such water and fix and collect rates to be paid for the use of the same.

SECTION 2. The said city, for the purpose aforesaid, may take, by purchase or otherwise, and hold the waters of any pond, stream, spring or wells not heretofore taken or purchased by the Gloucester Water Supply Company, within the limits of said city, also the Chebacco lakes in the towns of Essex, Wenham and Hamilton, and the waters which flow into the same and the water rights connected therewith, and obtain and take water by means of bored, driven, artesian or other wells on any land within said city, and hold and convey said water through said city and through said towns of Essex, Wenham and Hamilton from said lakes, and may also take and hold, by purchase or otherwise, all lands, rights of way and easements necessary for holding, storing, purifying and preserving such water and for conveying the same to any part of said city of Gloucester; and may erect, on the lands thus taken or held, proper dams, reservoirs, buildings, fixtures and other structures, and may make
65 excavations, procure and operate machinery and provide such other means and appliances as may be necessary for the establishment and maintenance of complete and effective water works; and may construct and lay down conduits, pipes and other works, under or over any lands, water courses, railroads or public or private ways, and along any such way, in such manner as not unnecessarily to obstruct the same; and for the purpose of constructing, maintaining and repairing such conduits, pipes and other works, and for all proper purposes of this act, said city may dig up any such lands,

and, under the direction of the board of selectmen of any town in which said ways are situated, may enter upon and dig up any such ways in such manner as to cause the least hindrance to public travel on such ways.

The title to all land taken or purchased under the provisions of this act shall vest in said city, and the land so taken may be managed, improved and controlled by the board of water commissioners hereinafter provided for, in such manner as they shall deem for the best interests of said city.

SECTION 3. Said city shall, within ninety days after the taking of any lands, rights of way, water rights, water sources or easements as aforesaid, otherwise than by purchase, file and cause to be recorded in the registry of deeds for the southern district for said county of Essex a description thereof sufficiently accurate for identification, with a statement of the purpose for which the same were taken, signed by the water commissioners hereinafter provided for.

SECTION 4. Said city shall pay all damages sustained by any person or corporation in property by the taking of any lands, right of way, water, water sources, water rights or easement, or by any other thing done by said town under the authority of this act, except that said city shall not be liable to pay any damages resulting from taking water from the said Chebacco lakes other than the Commonwealth itself would be legally liable to pay. Any person or corporation sustaining damages as aforesaid under this act, who fails to agree with said city as to the amount of damages sustained, may have the damages assessed and determined in the manner provided by law when land is taken for the laying out of highways, on application at any time within the period of two years from the taking of such land or other property, or the doing of other injury under the authority of this act; but no such application shall be made after the expiration of said two years. No application for the assessment of damages shall be made for the taking of any water, water right or for any injury thereto until the water is actually withdrawn or diverted by said town under the authority of this act.

Said city shall pay all damages sustained under the authority of this act by the town of Essex in its alewife fishery, which, unless agreed upon, shall be assessed and determined in the manner hereinbefore provided; *provided, however*, that said city may construct and maintain suitable fishways for the preservation of said alewife fishery.

66 SECTION 5. In every case of a petition to the superior court for an assessment of damages the city may tender to the complainant or his attorney any sum, or may bring the same into court to be paid to the complainant for the damages by him sustained or claimed in his petition, or may in writing offer to be defaulted and that damages may be awarded against it for the sum therein expressed, and if the complainant does not accept such sum, with his costs up to that time, but proceeds in his suit, and does not recover greater damages than were so offered or tendered, not including interest on the sum recovered in damages, from the

date of such offer or tender, the city shall have judgment for its costs, after said date for which execution shall issue, and the complainant, if he recovers damages, shall be allowed his costs only to the date of such offer or tender.

SECTION 6. The said city may, for the purpose of paying the necessary expenses and liabilities incurred under the provisions of this act, issue from time to time bonds, notes or scrip to an amount not exceeding in the aggregate five hundred and fifty thousand dollars; such bonds, notes or scrip shall bear on their face the words "City of Gloucester water loan," shall be payable at the expiration of periods not exceeding thirty years from the date of issue, shall bear interest, payable semi-annually, at a rate not exceeding six per centum per annum, and shall be signed by the treasurer of the city and be countersigned by the water commissioners hereinafter provided for. The said city may sell such securities at public or private sale or pledge the same for money borrowed for the purpose of this act upon such terms and conditions as it may deem proper; *Provided*, That such securities shall not be sold for less than the par value thereof. The said city shall provide at the time of contracting said loan for the establishment of a sinking fund, and shall annually contribute to such fund a sum sufficient, with the accumulations thereof, to pay the principal of such loan at maturity. The said sinking fund shall remain inviolate and pledged to the payment of said loan, and shall be used for no other purpose.

SECTION 7. The said city, instead of establishing a sinking fund, may, at the time of authorizing said loan, provide for the payment thereof in such annual proportionate payments as will extinguish the same within the time prescribed in this act; and when such vote has been passed the amount required thereby shall without further vote be assessed by the assessors of said city in each year thereafter until the debt incurred by said loan shall be extinguished, in the same manner as other taxes are assessed under the provisions of section thirty-four of chapter eleven of the Public Statutes.

SECTION 8. The return required by section ninety-one of chapter eleven of the Public Statutes shall state the amount of any sinking fund established under this act, and if none is established, whether action has been taken in accordance with the provisions of the preceding section and the amounts raised and applied thereunder for the current year.

67 SECTION 9. The said city shall raise annually by taxation a sum which, with the income derived from water rates, will be sufficient to pay the current annual expenses of operating its water works and the interest as it accrues on the notes, bonds and scrip issued as aforesaid by said city, and such contributions to the sinking fund and payments on the principal as may be required under the provisions of this act.

SECTION 10. Whoever shall use any water taken under this act without the consent of said city, or shall wilfully or wantonly corrupt, pollute or divert any of the waters taken or held by said city pursuant to the provisions of this act, or destroy or injure any

structure, work or other property owned, held or used by said city under the authority and for the purposes of this act, shall forfeit and pay to said city three times the amount of damages assessed therefor, to be recovered in an action of tort, and upon conviction of either of the above wilful or wanton acts shall also be punished by a fine not exceeding three hundred dollars or by imprisonment not exceeding one year.

SECTION 11. The occupant of any tenement shall be liable for the payment of the rent for the use of water in such tenement, and the owner shall also be liable, in case of the non-payment by the occupant, for all sums due for the use of water under this act, to be collected in an action of contract in the name of the City of Gloucester.

SECTION 12. The powers and duties granted to and imposed upon the City of Gloucester by this act, including the purchase or taking of any lands or other property or rights, shall be exercised by a board of water commissioners, consisting of three residents of the city, to be appointed by the mayor, with the approval of the city council. Said commissioners shall be appointed and hold their office from the time of their appointment and approval for the terms of one, two and three years, respectively, from the first Monday of February next following their appointment, and thereafter one commissioner shall be appointed each year for the term of three years from the first Monday in February; all such commissioners, except in case of removal, shall hold office until their successors are appointed in their stead; vacancies occurring during the term may be filled for the remainder of the term. No person shall be appointed commissioner who holds at the time any city office by popular election. Any commissioner, after due notice and hearing, may be removed at any time by a two-thirds vote of each branch of the city council for any cause which shall be deemed sufficient and shall be expressed in the vote of removal. The commissioners shall receive such compensation for their services as the city council, by a two-thirds vote of each branch thereof, shall determine.

SECTION 13. The said commissioners shall superintend and direct the construction, execution and performance of all the works, matters and things mentioned in the preceding section; they shall be subject to such ordinances, rules and regulations in the exe-
68 cution of such duties as the city council may from time to time ordain and establish, not inconsistent with the provisions of this act and the laws of this Commonwealth. Said water commissioners shall make all contracts for the above purpose in the name and behalf of the city, but no contract shall be made by them which involves the expenditure of money not already appropriated for the purpose by the city council of said Gloucester. A majority of said commissioners shall be a quorum for the exercise of the powers and the performance of the duties of the commission.

SECTION 14. The water commissioners shall fix such prices or rents for the use of water as shall produce annually as near as may be a net surplus over operating expenses and interest charges equal

to two per centum of the total amount of the bonds, notes or scrip issued under this act, after paying all current expenses of operating the water works and interest upon loans, and after payment of all expense for new construction, not exceeding ten thousand dollars in any one year after the original construction.

The commissioners of sinking funds of the city of Gloucester shall be trustees of the sinking fund which shall be set apart for the payment and redemption of said water loan, and which shall remain inviolate and pledged to the payment of said loan and shall be used for no other purpose. The net surplus aforesaid shall be paid into the sinking fund, if any is established hereunder, and if said surplus does not equal two per centum of the total amount of the bonds, notes and scrip issued under this act, the city shall raise by general taxation a sum which, with the surplus, shall equal said two per centum, and shall contribute said sum to the sinking fund.

Said commissioners shall annually, and as often as the city council may require, render an account of all their doings in relation to the sinking fund, and shall be governed by the provisions of section eleven of chapter twenty-nine of the Public Statutes, except as herein otherwise provided.

SECTION 15. The said town of Essex may connect water pipes with the main pipe of the city of Gloucester in said town, such connection to be made to the satisfaction and approval of the engineer of said city, and in such case said city shall furnish to the inhabitants of said town through the pipes so connected a supply of water for the extinguishment of fires and for domestic and other purposes, for which said town of Essex shall pay said city an equitable compensation, which, in case of disagreement, shall be determined by three commissioners to be appointed by the supreme judicial court upon application of either party and notice to the other, whose award, when accepted by said court, shall be binding upon the parties for the term of five years. And nothing in this act shall be construed to prevent the said towns of Essex, Wenham and Hamilton from supplying themselves with water from the said Chebacco lakes for fire, domestic and other purposes.

69 SECTION 16. At any time within thirty days after this act shall have been accepted by the City of Gloucester, as hereinafter provided, the Gloucester Water Company may notify the mayor of Gloucester in writing that it desires to sell to said city its lands, easements, waters, water rights, reservoirs, pipes, hydrants, tools and all apparatus used in supplying the inhabitants of Gloucester with water, and execute and deliver to said city proper deeds and instruments, in writing, conveying to said city the property aforesaid, whereupon the property thus conveyed shall become the property of the city of Gloucester, and the said city shall be liable to pay to said company the fair value of the property thus conveyed; and in case the said city and the said company shall be unable to agree upon the value of said property, the supreme judicial court may, upon application of either party and notice to the other, appoint three commissioners, one of whom shall be a skilled engi-

neer and one learned in the law, who shall determine the fair value of said property conveyed as aforesaid, and whose award, when accepted by the court, shall be final. Said commissioners in determinmg the value of said property shall not take into account the franchise of said company, the value of the city of Gloucester and its inhabitants as a market for the sale of water, nor the income theretofore earned by said company, nor the earning capacity of said property, but shall only ascertain the fair value for use by said city of the specific property hereinbefore named which shall have been conveyed as aforesaid. If any part of the capital or assets of the company has been paid in in property instead of cash, the valuation heretofore placed upon such property by the company or otherwise shall not be conclusive in estimating its value under the foregoing provisions, but may be inquired into by said city, and if shown to have been excessive may be reduced by the authority fixing the price of the plant and property. And all said property so acquired by said city shall be thereafter held and managed under and according to the provisions of this act.

SECTION 17. This act shall be submitted to the qualified voters of the city of Gloucester for its acceptance and shall be void unless such voters, voting in their respective wards and precincts at a legal meeting called by order of the city council, in the same manner as meetings for municipal elections are called, shall, within three years from the passage of this act, determine by ballot, by a majority vote of those present and voting, to accept the same.

SECTION 18. So much of this act as authorizes the submission of the question of its acceptance to the legal voters of said city shall take effect upon its passage, but it shall not take further effect unless and until accepted, as hereinbefore provided, by the qualified voters of said city, and the number of meetings called for the purpose of this acceptance shall not exceed three in any one year.

70 EXHIBIT K.

Acts and Resolves of Massachusetts, 1895, *Chap.* 451.

"An act to supply the city of Gloucester with water.

Be it enacted, etc., as follows.—

SECTION 1. The City of Gloucester may supply itself and its inhabitants with water for the extinguishment of fires and for domestic, manufacturing and other purposes; and may establish fountains and hydrants, relocate or discontinue the same, may regulate the use of such water and fix and collect rates to be paid for the use of the same.

SECTION 2. Said city, for the purposes aforesaid, may take, by purchase or otherwise, and hold the waters of any pond, stream, spring or wells not heretofore taken or purchased by the Gloucester Water Supply Company, within the limits of said city, also the Chebacco

lakes in the towns of Essex, Wenham and Hamilton, and the waters which flow into the same and the water rights connected therewith, and may obtain and take water by means of bored, driven, artesian or other wells, on any land within said city, and hold and convey said water through said city and through said towns of Essex, Wenham and Hamilton, from said lakes, and may also take and hold, by purchase or otherwise, all lands, rights of way and easements necessary for holding, storing, purifying and preserving such water and for conveying the same to any part of said city of Gloucester; and may erect on the lands thus taken or held, proper dams, reservoirs, buildings, fixtures and other structures, and may make excavations, procure and operate machinery, and provide such other means and appliances as may be necessary for the establishment and maintenance of complete and effective water works, and may construct and lay down conduits, pipes and other works, under or over any lands, water courses, railroads or public or private ways, and along any such way in such manner as not unnecessarily to obstruct the same; and for the purpose of constructing, maintaining and repairing such conduits, pipes and other works and for all proper purposes of this act, said city may dig up any such lands, and, under the direction of the board of selectmen of the town in which said ways are situated, may enter upon and dig up any such ways in such manner as to cause the least hindrance to public travel thereon. The title to all land taken or purchased under the provisions of this act shall vest in said city, and the land so taken may be managed, improved and controlled by the board of water commissioners hereinafter provided for, in such manner as they shall deem for the best interests of said city.

SECTION 3. Said city shall, within ninety days after the taking of any lands, rights of way, water rights, water sources or easements as aforesaid, otherwise than by purchase, file and cause to be recorded in the registry of deeds for the southern district for the
71 county of Essex a description thereof sufficiently accurate for identification, with a statement of the purpose for which the same were taken, signed by the water commissioners hereinafter provided for.

SECTION 4. Said city shall pay all damages sustained by any person or corporation in property by the taking of any lands, right of way, water, water sources, water rights or easement, or by any other thing done by said city under the authority of this act. Any person or corporation sustaining damages as aforesaid under this act, who fails to agree with said city as to the amount of damages sustained, may have the damages assessed and determined in the manner provided by law when land is taken for the laying out of highways, on making application at any time within the period of two years from the taking of such land or other property or the doing of other injury under the authority of this act; but no such application shall be made after the expiration of said two years. No application for the assessment of damages shall be made for the taking of any water, water right or for any injury thereto until the

water is actually withdrawn or diverted by said city under the authority of this act. Said city shall pay all damages sustained under the authority of this act by the town of Essex in its alewife fishery, which, unless agreed upon, shall be assessed and determined in the manner hereinbefore provided; *provided, however,* that said city may construct and maintain suitable fishways for the preservation of said alewife fishery, said fishways to be constructed to the satisfaction of and to be approved by the commissioners on inland fisheries and game.

SECTION 5. In every case of a petition to the superior court for an assessment of damages the city may tender to the complainant or his attorney any sum, or may bring the same into court to be paid to the complainant for the damages by him sustained or claimed in his petition, or may in writing offer to be defaulted and that damages may be awarded against it for the sum therein expressed, and if the complainant does not accept such sum, with his costs up to that time, but proceeds in his suit, and does not recover greater damages than were so offered or tendered, not including interest on the sum recovered in damages from the date of such offer or tender, the city shall have judgment for its costs after said date, for which execution shall issue; and the complainant, if he recovers damages, shall be allowed his costs only to the date of such offer or tender.

SECTION 6. Said city may, for the purpose of paying the necessary expenses and liabilities incurred under the provisions of this act, issue from time to time bonds, notes or scrip, to an amount sufficient for such purpose, to be determined by the board of water commissioners hereinafter provided for. Such bonds, notes or scrip shall bear on their face the words, City of Gloucester water loan, and shall be payable at the expiration of periods not exceeding thirty years from the date of issue, shall bear interest, payable semi-annually, at a rate not exceeding six per cent. per annum, and shall be signed by the treasurer of the city
72 and be countersigned by the water commissioners hereinafter provided for. Said city may sell such securities at public or private sale, or pledge the same for money borrowed for the purpose of this act, and upon such terms and conditions as it may deem proper; *provided,* that such securities shall not be sold for less than the par value thereof. Said city shall provide at the time of contracting said loan for the establishment of a sinking fund and shall annually contribute to such fund a sum sufficient with the accumulations thereof to pay the principal of such loan at maturity. Said sinking fund shall remain inviolate and pledged to the payment of said loan, and shall be used for no other purpose.

SECTION 7. Said city instead of establishing a sinking fund may, at the time of authorizing said loan, provide for the payment thereof in such annual proportionate payments as will extinguish the same with- the time prescribed in this act; and when such vote has been passed the amount required thereby shall without further vote be assessed by the assessors of said city in each year thereafter until the debt incurred by said loan shall be extinguished, in the same

manner as other taxes are assessed under the provisions of section thirty-four of chapter eleven of the Public Statutes.

SECTION 8. The return required by section ninety-one of chapter eleven of the Public Statutes shall state the amount of any sinking fund established under this act, and if none is established whether action has been taken in accordance with the provisions of the preceding section, and the amounts raised and applied thereunder for the current year.

SECTION 9. Said city shall raise annually by taxation a sum which, with the income derived from water rates, will be sufficient to pay the current annual expenses of operating its water works and the interest as it accrues on the notes, bonds and scrip issued as aforesaid by said city, and such contributions to the sinking fund and payments on the principal as may be required under the provisions of this act.

SECTION 10. Whoever uses any water taken under this act without the consent of said city, or wilfully or wantonly corrupts, pollutes or diverts any of the waters taken or held by said city pursuant to the provisions of this act, or destroys or injures any structure, work or other property owned, held or used by said city under the authority and for the purposes of this act, shall forfeit and pay to said city three time the amount of damages assessed therefor, to be recovered in an action of tort; and upon conviction of either of the above wilful or wanton acts shall also be punished by a fine not exceeding three hundred dollars or by imprisonment not exceeding one year.

73 SECTION 11. The occupant of any tenement shall be liable for the payment of the rent for the use of water in such tenement, and the owner shall also be liable, in case of non-payment by the occupant, for all sums due for the use of water under this act, to be collected in an action of contract in the name of the City of Gloucester.

SECTION 12. The powers and duties granted and imposed upon the City of Gloucester by this act, including the purchase or taking of any lands or other property or rights, shall be exercised by a board of water commissioners, consisting of three residents of the city, to be appointed by the mayor, with the approval of the city council. Said commissioners shall be appointed and hold their office from the time of their appointment and approval for the terms of one, two and three years, respectively, from the first Monday of February next following their appointment, and thereafter one commissioner shall be appointed each year for the term of three years from the first Monday in February; all such commissioners, except in case of removal, shall hold office until their successors are appointed in their stead; vacancies occurring during the term may be filled for the remainder of the term. No person shall be appointed commissioner who holds at the time any city office by popular election. Any commissioner, after due notice and hearing, may be removed at any time by a two thirds vote of each branch of the city council for any cause which shall be deemed sufficient and shall be expressed

in the vote of removal. The commissioners shall receive such compensation for their services as the city council, by a two thirds vote of each branch thereof, shall determine.

SECTION 13. Said commissioners shall superintend and direct the construction, execution and performance of all the works, matters and things mentioned in the preceding sections; they shall be subject to such ordinances, rules and regulations in the execution of such duties as the city council may from time to time ordain and establish, not inconsistent with the provisions of this act and the laws of this Commonwealth. Said water commissioners shall make all contracts for the above purpose in the name and behalf of the city, but no contracts shall be made by them which involve the expenditure of money not already appropriated for the purpose by the city council. A majority of said commissioners shall be a quorum for the exercise of the powers and the performance of the duties of the commission.

SECTION 14. Said commissioners shall fix such prices or rents for the use of water as shall produce annually as near as may be a net surplus over operating expenses and interest charges equal to two per cent. of the total amount of the bonds, notes or scrip issued under this act, after paying all current expenses of operating the water works and interest upon loans, and after payment of all expense for new construction, not exceeding ten thousand dollars in any one year after the original construction. The commissioners of sinking funds of the city of Gloucester shall be trustees of the sinking
74 fund which shall be set apart for the payment and redemption of said water loan, and which shall remain inviolate and pledged to the payment of said loan and shall be used for no other purpose. The net surplus aforesaid shall be paid into the sinking fund, if any is established hereunder, and if said surplus does not equal two per cent. of the total amount of the bonds, notes and scrip issued under this act, the city shall raise by general taxation a sum which, with the surplus, will equal said two per cent., and shall contribute said sum to the sinking fund. Said commissioners shall annually, and as often as the city council may require, render an account of all their doings in relation to the sinking fund, and shall be governed by the provisions of section eleven of chapter twenty-nine of the Public Statutes, except as herein otherwise provided.

SECTION 15. The town of Essex may connect water pipes with the main pipe of the city of Gloucester in said town, such connection to be made to the satisfaction of the engineer of said city, and in such case said city shall furnish to the inhabitants of said town through the pipes so connected a supply of water for the extinguishment of fires and for domestic and other purposes, for which the town of Essex shall pay to said city an equitable compensation. Said compensation in case of disagreement, shall be determined by three commissioners to be appointed by the supreme judicial court, upon application of either party and notice to the other, and the award of said commissioners, when accepted by said court, shall be

binding upon the parties for the term of five years. Nothing in this act shall be construed to prevent the towns of Essex, Wenham, and Hamilton from supplying themselves with water from the Chebacco lakes for the extinguishment of fires and for domestic and other purposes, or to prevent the town of Manchester from so supplying itself from Gravel pond, so-called.

SECTION 16. If within thirty days after this act shall have been accepted by the City of Gloucester, as hereinafter provided, the Gloucester Water Supply Company shall notify the mayor of the city of Gloucester in writing that it desires to sell to said city all the corporate property and all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools and all appliances owned by said company, and used in supplying said city and the inhabitants thereof with water, and shall file with the city clerk of said city a specification and description thereof, said city shall not proceed to supply water to itself or its inhabitants under the authority of this act, unless it shall have first purchased of said company the property aforesaid; and said company is authorized to make sale of said property to said city, and said city is authorized to purchase the same and manage and use the property thus conveyed for the purposes and under the provisions of this act. Whenever, within one year from the passage of this act, said city shall by a majority vote of the legal voters of said city, present and voting thereon at a legal meeting called for that purpose by order of the city council, or at any regular municipal election, vote to purchase said
75 property, notice of the desire of said company to sell the same having been given as hereinbefore provided, said property shall thereupon become the property of said city, and said city shall pay to said company the fair value thereof, to be ascertained as hereinafter provided. In case said city and said company, after conference thereon, shall be unable to agree upon the value of said property, the supreme judicial court shall, upon application of either party and notice to the other, appoint three commissioners, who shall determine the fair value of said property, and whose award, when accepted by the court, shall be final. Such value shall be estimated without enhancement on account of future earning capacity, or future good will, or on account of the franchise of said company.

SECTION 17. This act shall be submitted to the qualified voters of the city of Gloucester for its acceptance and shall be void unless such voters, voting in their respective wards and precincts at a legal meeting called for that purpose by order of the city council, in the same manner as meetings for municipal elections are called, or at any regular municipal election, shall, within one year from the passage of this act, determine by ballot by a majority vote of those present and voting thereon to accept the same. The warrant for notifying such meeting, if called specially as aforesaid, shall specify when the polls shall be opened for the purpose of voting and when they shall be closed.

SECTION 18. So much of this act as authorizes the submission of the question of its acceptance to the legal voters of said city shall take effect upon its passage, but it shall not take further effect unless and until accepted as hereinbefore provided, by the qualified voters of said city; and the number of meetings called for the purpose of voting upon the question of its acceptance shall not exceed three in any one year.

Approved June 4, 1895.

76 EXHIBIT L.

Honorable Benjamin F. Cook, mayor of the city of Gloucester.

SIR: The Gloucester Water Supply Company hereby notifies you that it desires to sell to the City of Gloucester all the corporate property and all the rights, privileges, easements, lands, waters, water-rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all appliances owned by said company and used in supplying said city and the inhabitants thereof with water.

A copy of the vote of said Gloucester Water Supply Company authorizing this notice is hereto annexed.

Dated at Gloucester this fifteenth day of August, 1895.

(Signed) GLOUCESTER WATER SUPPLY COMPANY,
By DAVID W. LOW, *Clerk.*

77 EXHIBIT M.

The Gloucester Water Supply Company hereby files with the city clerk of Gloucester a specification and description of all the corporate property, and all the rights, privileges, easements, lands, waters, water-rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools and all appliances owned by said company and used in supplying said city and the inhabitants thereof with water.

Item 1. All the waters within or upon the parcel of land or real estate hereinafter described, and all the waters that may or can be obtained therein, or can be used or conveyed therefrom, and also all said parcel of land or real estate. Said land or real estate is situate in the city of Gloucester aforesaid, in ward eight thereof, and is bounded and described as follows.—Commencing at a stone bound marked "E" at the northern end of the dam at Dikes meadow, so-called; thence north 62 degrees 25 min. west 177 feet; thence north 52 degrees west 208 feet; thence north 33 degrees 30 min. east 114 8/10 feet; thence north 17 degrees 30 min. west 93 feet; thence south 78 degrees 40 min. west 148 5/10 feet; thence north 51 degrees west 92 2/10 feet; thence north 11 degrees 30 min. west 75 5/10 feet; thence north 4 degrees east 291 feet; thence north 3 degrees

east 233 feet; thence north 17 degrees 30 min. east 254 feet; thence north 29 degrees east 212 6/10 feet; thence north 36 degrees 30 min. east 582 5/10 feet; thence north 41 degrees east 755 7/10 feet; thence north 34 degrees 30 min. east 420 feet; thence north 53 degrees west 162 feet; thence south 52 degrees 30 min. west 467 5/10 feet; thence south 91 5/10 feet; thence south 35 degrees 34 min. west 92 5/10 feet; thence south 81 degrees 45 min. west 549 9/10 feet; thence south 33 degrees 15 min. west 313 4/10 feet; thence south 53 degrees 38 min. east 277 8/10 feet; thence south 13 degrees 10 min. east 161 5/10 feet; thence south 40 degrees west 82 5/10 feet; thence south 69 degrees 5 min. west 138 5/10 feet; thence north 36 degrees 25 min. west 150 feet; thence north 27 degrees 45 min. east 96 feet, to station "B" shown on plan next hereinafter referred to; thence north 45 degrees 45 min. west 150 1/10 feet, to station "A" shown on said plan; thence south 52 degrees 30 min. west 236 6/10 feet; thence south 69 degrees west 110 5/10 feet; thence south 75 degrees 30 min. west 83 feet; thence south 40 degrees 45 min. east 256 7/10 feet; thence south 2 degrees 10 min. east 167 5/10 feet; thence south 15 degrees 40 min. west 243 feet; thence south 19 degrees west 89 feet; thence south 45 degrees 45 min. west 113 feet; thence south 70 degrees 45 min. west 327 5/10 feet; thence north 79 degrees 15 min. west 81 6/10 feet; thence north 26 degrees 15 min. west 61 8/10 feet; thence north 22 degrees 30 min. east 138 1/10 feet; thence south 77 degrees west 93 feet; thence south 74 degrees west 110 8/10 feet; thence north 76 degrees 45 min. west 378 5/10 feet; thence south 71 degrees 45 min. west 217 5/10 feet; thence south 39 degrees east 302 feet; thence south 38 degrees 55 min. west 388 5/10 feet; thence south 76 degrees 50 min. west 384 feet; thence south 22 degrees 20 min. east 352 feet; thence south
78 82 degrees east 134 2/10 feet; thence north 56 degrees 45 min. east 263 feet; thence north 84 degrees 30 min. east 104 feet; thence south 58 degrees 30 min. east 175 feet; thence south 45 degrees east 132 feet; thence south 20 degrees west 116 feet; thence south 22 degrees 20 min. west 342 5/10 feet; thence south 15 degrees east 87 feet; thence south 85 degrees 50 min. east 200 5/10 feet; thence north 75 degrees 30 min. east 76 6/10 feet; thence north 35 degrees east 247 5/10 feet; thence north 12 degrees east 209 8/10 feet; thence north 30 degrees 45 min. east 224 5/10 feet; thence north 75 degrees 45 min. east 163 5/10 feet; thence south 76 degrees 50 min. east 219 5/10 feet; thence south 64 degrees 10 min. east 211 feet; thence south 43 degrees 10 min. east 244 5/10 feet; thence south 53 degrees 45 min. east 155 5/10 feet; thence south 72 degrees 30 min. east 79 feet; thence south 74 degrees east 97 6/10 feet; thence north 27 degrees 15 min. east 317 1/10 feet to the point of beginning. Including also the dam 290 feet in length at the top and 170 feet in length at the bottom, the pond having an area of about 85 acres, and all embankments, structures, pipes and gates in or upon said land or real estate and all fixtures annexed thereto.

The above described courses and distances are lines of surveys

and are shown upon a plan entitled "Plan of storage basin at Dikes meadow, showing land taken by Gloucester Water Supply Co., as surveyed by Theo. Overbeck C. E., June 1884." by full red lines from which lines offsets are taken to irregular points, shown by blue lines on said plan, which blue lines indicate the flowage line at high water mark and to which blue line or line of high water flowage said company owns, together with all the land or real estate between the outside broken red lines shown on said plan and the blue or flowage line, all of which land is owned by said company. Said plan was received and filed in the registry of deeds for said Essex county, southern district, upon July tenth, 1884.

Item 2. All the waters within or upon the parcel of land or real estate hereinafter described, and all the waters that may be or can be obtained therein, or can be used or conveyed therefrom, and also all said parcel of land or real estate. Said land or real estate is situate in the city of Gloucester aforesaid in ward eight thereof, and is bounded and described as follows.—Commencing at a point marked "A" on plan hereinafter referred to, being the second plan described in this instrument, near the southwestern end of the dam at Wallace brook; thence south 7 degrees 30 min. west 178 8/10 feet; thence south 31 degrees 30 min. west 55 5/10 feet; thence south 43 degrees 15 min. west 279 2/10 feet; thence south 55 degrees 15 min. west 196 3/10 feet; thence south 64 degrees 45 min. west 182 feet; thence south 14 degrees east 160 feet; thence south 29 degrees 35 min. west 391 7/10 feet; thence south 53 degrees 25 min. west 211 8/10 feet; thence south 1 degree west 235 8/10 feet; thence south 62 degrees west 173 8/10 feet; thence south 49 degrees west 266 feet; thence south 3 degrees west 114 feet; thence south 59 degrees 45 min. west 43 2/10 feet; thence south 59 degrees west 259 feet; thence south 62 degrees 45 min. west 144 feet; thence north 86 degrees 30 min. west 177 2/10 feet; thence south 11 degrees 45 min. west 151 feet; thence south 24 degrees 45 min. east 156 5/10 feet; thence south 10 degrees east 92 feet; thence south 45 degrees west 110 feet; thence south 47 degrees east 223 8/10 feet; thence north 70 degrees east 262 feet; thence north 40 degrees east 215 feet; thence north 38 degrees east 365 feet; thence north 36 degrees 30 min. east 451 5/10 feet; thence north 33 degrees 15 min. east 151 feet; thence north 41 degrees 45 min. east 416 feet; thence north 38 degrees 50 min. east 248 feet; thence north 20 degrees 45 min. east 223 feet; thence north 31 degrees east 224 feet; thence north 48 degrees 30 min. east 287 feet; thence north 71 degrees east 157 5/10 feet; thence north 81 degrees east 405 feet; thence north 34 degrees east 320 feet; thence north 45 degrees east 328 feet; thence north 36 degrees east 557 5/10 feet; thence north 35 degrees 15 min. east 341 feet; thence north 41 degrees east 407 feet; thence north 34 degrees west 232 5/10 feet; thence south 48 degrees west 227 feet; thence south 19 degrees 25 min. west 180 feet; thence south 71 degrees 25 min. west 194 feet; thence south 32 degrees 20 min. west 275 2/10 feet; thence south 16 degrees 35 min. west 162 5/10 feet; thence south 33 de-

grees 15 min. west 335 feet; thence south 60 degrees west 194 3/10 feet; thence south 72 degrees west 200 feet; thence north 68 degrees west 380 5/10 feet; thence south 40 degrees 30 min. west 344 feet, to the point of beginning. Including also the dam 230 feet in length at the top and 130 feet in length at the bottom, the pond having an area of about 35 acres, and all embankments, structures, pipes and gates in or upon said land or real estate and all fixtures annexed thereto.

The above described courses and distances are lines of surveys and are shown upon a plan entitled "Plan of land taken by Gloucester Water Supply Co., for storage basin at Wallace brook, Gloucester, Mass., from survey Theodore Overbeck, civ. eng., G. Norman Weaver, eng'r," by full red lines, from which lines offsets are made to irregular lines shown by blue lines on said plan, which blue lines indicate the flowage line at high water mark and to which blue line or line of high water flowage said company owns, together with all the land or real estate between the outside broken red line shown on said plan and the blue or flowage line, all of which land is owned by said company. Said plan was received and filed in the registry of deeds of said Essex county, southern district, upon September eleventh, A. D. 1884.

Item 3. A right of way 20 feet in width over a road or way from the easterly side of the basin above described, which road or way begins at a point southeasterly from the point marked "A" on the plan described *it* item 2 herein, at a point marked "C 85" on said plan, thence south 57 degrees east 460 feet over land now or formerly owned or supposed to be owned by Theophilus Bray, Joseph Bray, Mary Dennen, and Francis W. Homans to land and roadway of said Homans; thence over said Homans' way to be of 20 feet in width, north 37 degrees east 320 feet; thence north 27 degrees east 240 feet; thence north 2 degrees east 90 feet; thence north 30 degrees west 85 feet; thence north 16 degrees east 50 feet; thence north 34 degrees east 480 feet; thence north 22 degrees 55 min. east 260 feet to Essex avenue, being shown on said plan described in item 2 in this instrument.

80 *Item 4.* A right of way twenty feet in width, for the purpose of laying and repairing pipes, between the storage basin at Wallace brook and the pumping station at Mill brook, the same being over land of Albion Bray and others, and is fully shown upon said plan described in item 2 herein.

Item 5. A right of way 20 feet in width, for the purpose of laying and repairing pipes extending from Dikes meadow basin in ward eight in said Gloucester to the pumping station at Mill brook, so called, commencing at the dam at Dikes meadow at point 64 feet south 27 degrees 15 min. west from a bound, then south 55 degrees 30 min. east 505 8/10 feet; thence south 79 degrees east 243 feet; thence south 59 degrees east 349 feet; thence south 81 degrees east 318 feet; thence north 82 degrees east 103 feet; thence north 60 degrees 30 min. east 117 4/10 feet; thence north 50 degrees east 387 5/10 feet; thence north 72 degrees east 330 5/10 feet; thence north 81

degrees east 440 feet; thence north 69 degrees east 438 2/10 feet; thence north 57 degrees east 492 8/10 feet; thence north 68 degrees east 336 5/10 feet; thence north 65 degrees 45 min. east 405 7/10 feet; thence north 45 degrees 45 min. east 177 4/10 feet; thence north 21 degrees 55 min. east 147 feet; thence north 45 degrees 25 min. east 497 5/10 feet to said pumping station.

The above described lines are lines of survey and are shown on a plan entitled "Plan of land taken by Gloucester Water Supply Co., for a conduit from Dikes meadow to pumping station from survey by Theodore Overbeck, civil engineer, Aug., 1884" by full red lines; the outside lines of the way are shown on said plan by full black lines. Said plan was received and filed in said registry of deeds, September 11, A. D. 1884.

Also a piece of land situate in said ward eight, Gloucester, shown on said last named plan by broken red lines containing about 11,250 feet bounded southerly by the way last above described on the north by land now or late of A. D. Bray, on the east 75 feet by land now or late of said Bray, and on the west by land now or late of said Bray 75 feet.

Item 6. A right of way 20 feet in width situate at said Gloucester in ward eight thereof and extending from said pumping station to the supply reservoir on Bonds hill, so-called, bounded, beginning at the reservoir as shown on a plan entitled "Plan of land taken by Gloucester Water Supply Company for pumping main as surveyed by Theodore Overbeck, civil engineer, Gloucester, August, 1884. G. Norman Weaver, engineer," and from said reservoir running north 57 degrees west 40 feet to an angle; thence south 75 degrees west 83 7/10 feet; thence north 72 degrees west 2630 feet; thence north 57 degrees west 112 feet; thence north 45 degrees west 137 feet; thence north 57 degrees west 200 feet; thence north 77 degrees west 300 feet; thence north 80 degrees west 50 feet; thence north 74 degrees 30 min. west 212 feet; thence north 88 degrees west 257 feet; thence north 84 degrees west 247 feet; thence north 54 degrees west 219 feet; thence north 30 degrees 45 min. west 314 5/10 feet;
81 thence 83 feet under the Eastern railroad; thence 120 feet to said pumping station, all of which lines are lines of survey and are shown on said plan described in item 6 herein by full red lines, which red lines are the centre line of said way, and the side lines of said way are shown on said plan by full black lines distant at all points ten feet from said red lines. Said plan was received and filed in said registry of deeds upon September 11th, A. D. 1884.

Item 7. A piece of land situate at said Gloucester, in ward 8 thereof, near the land occupied by said company for reservoir, containing 5,000 square feet, bounded southwesterly 50 feet by land now or formerly of Marshall, northwesterly 100 feet by land now or late of Marshall, northeasterly 50 feet by land now or late of Marshall, and southeasterly by said company's land upon which its reservoir is located, said land being shown on said plan described in item 6 herein, and is included in broken red lines indicated on said plan.

Item 8. A right of way 20 feet in width, situate in said Gloucester,

in ward 8 thereof, extending from Western avenue, so called, to land of Walter Cressy, bounded, beginning at said avenue, near barn now or formerly of said Cressy; thence south 82 degrees 30 min. west 637 feet; thence north 51 degrees 30 min. west 145 4/10 feet; thence north 37 degrees 30 min. west 143 feet; thence north 52 degrees 30 min. west 67 feet; thence north 70 degrees west 109 5/10 feet, on to land of said Walter Cressy. Said courses and distances are lines of survey, and shown on a plan entitled, "Plan of land taken by Gloucester Water Supply Co., for reservoir and supply main, from survey of Theodore Overbeck, civ. eng'r, Gloucester, August, 1884," by full red lines, which red lines are the centre lines of said way, and the side lines of said way are shown on said plan by full black lines, distant at all points ten feet from said red lines. Said plan was received and filed in said registry of deeds September 11th, A. D., 1884.

Item 9. A right of way 20 feet in width situate in said Gloucester, in ward 8 thereof, for laying and repairing pipes, and is shown on plan entitled "Plan of land taken by Gloucester Water Supply Co., for location of supply main, from survey of Theodore Overbeck, civ. eng'r, Gloucester, September 4, 1884, G. Norman Weaver, eng'r," by full red lines of survey, which red lines and land commence at a point on Western avenue, in said Gloucester, 40 7/10 feet from the southwest corner of a dwelling house now or late of W. H. H. Davis, and 22 9/10 feet from the northeast corner of the bridge of canal; thence north 72 degrees 15 minutes west 85 3/10 feet; thence south 75 degrees west 99 feet; thence south 67 degrees 22 minutes west 78 4/10 feet to Western avenue. And the limits of said way are located as shown on said plan by full black lines on each side of said red lines and parallel with said red lines. Said plan was received and filed in said registry of deeds upon September 11th, A. D. 1884.

82 *Item 10.* All the waters within or upon the parcel of land or real estate hereinafter described, and all the waters that may or can be obtained therein or can be used or conveyed therefrom, and also all of said parcel of land or real estate. Said land or real estate is situate in said city of Gloucester, in ward 8 thereof, and is bounded and described as follows.—Near the head of "Little river," so-called, and bounded beginning at a beech tree at the westerly side of the road leading to Kettle cove (Magnolia avenue); thence north 82 degrees west 140 feet to a bend in the stone wall on land now or late of Widow Freeman; thence by said land now or late of Widow Freeman 64 degrees 15 min. west 29 feet; thence north 77 degrees 30 min. west 89 feet 6 inches; thence north 32 degrees 45 min. west 49 feet to the southerly bar post of road to woods from said Freeman's land; thence south 64 degrees west 44 feet to a stake and stones; thence south 27 degrees east about 256 feet to the northeasterly corner of Theophilus Bray's land; thence by said Bray's land south 14 degrees 45 min. east 109 feet to said Kettle Cove road; thence by said road to the place of beginning. With the right to keep and maintain the dam thereon, or any dam which formerly stood thereof; with the right to maintain thereon the mill

as the same now stands or formerly stood; with the right and privilege to flow land at any time heretofore flowed by Nathaniel Webster, the former owner of said land.

Also another parcel of land adjoining the last described premises, bounded easterly by the highway leading to Essex, southerly and southwesterly by Kettle Cove road, westerly by the last described lot, and northerly by land now or formerly of Widow Freeman as the wall stands or formerly stood. Said last described lot is subject to the right of said Freeman to pass and repass in the usual way as reserved to her in her deed to Thomas Hall, recorded in said registry, Book 751, leaf 269. Said premises are held by said company subject to the express condition or restriction that Nathaniel Webster, his heirs and assigns, shall forever have the right to cut ice upon any pond that may be made upon said land and upon any waters that may be stored upon any land flowed by any dam now or hereafter erected thereon, with the right in said Webster to remove ice when cut, and with the condition or restriction that neither said Gloucester Water Supply Company nor its successors or assigns shall have the right to cut ice upon any such pond made or water stored as above specified, as reserved in deed of said Webster to said company, dated February 16, 1884, recorded in said registry, Book 1,124, leaf 272.

Including also upon said land the pumping station, consisting of a brick building, coal shed and outbuilding connected therewith, one pair Knowles' compound duplex double-acting steam pumps, with surface condensers, one engine, and all fixtures, fittings, appliances and appurtenances contained in said pumping station building, with the foundations, settings, connections, fittings and fixtures thereof; and the pond, two dams, gates, pipes, and appliances, situate upon said land described in item 10 herein; also two horizontal steam boilers in said pumping station building, with the fixtures and connections thereof.

83 *Item 11.* A certain parcel of land, with the dwelling-house and barn thereon, situate upon the northerly side of Proctor street, in said Gloucester, bounded as follows: Northerly by a bank wall and land now or late of Plumer, Allen and McGlauflin, there measuring 85 feet 9 inches, more or less; southerly by Proctor street 100 feet, more or less; easterly by land now or late of Francis Proctor 98 feet, more or less, and westerly by land now or late of Rich and Hodgkins, there measuring 109 feet, more or less.

Item 12. A certain parcel of land, with the dwelling-house thereon, situate in said Gloucester, in ward 8 thereof, bounded northeasterly by land of Barnard Stanwood; southeasterly by land of said company; southwesterly by land formerly of Theophilus Bray or Daniel Bray, or both; and northwesterly by land of the Eastern Railroad Company, now or formerly, and land now or formerly of Meriden, subject to a right of way over a certain road to the woods, as reserved by Frederick Wallace and others in their deed to David W. Low, dated January 18, 1882, recorded in said registry, Book 1,075, leaf 224.

Item 13. A certain parcel of land situate on or near Bond's hill, in ward 8, in said Gloucester, and bounded and described as follows: Beginning at a bound in the wall between land now or late of Cressy and now or late of Babcock; thence south 55 degrees east 111 6/10 feet to a bound; thence south 8 degrees east 282 feet; thence south 82 degrees west 138 feet; thence north 74 degrees 10 min. west 231 feet; thence north 41 degrees 50 min. west 134 4/10 feet to a bound at said wall at land now or late of Marshall; thence north 57 degrees east by said wall and land now or late of said Marshall and others 370 5/10 feet to the place of beginning, with the right to pass and repass over the way now travelled between the last described parcel of land and the "Pest House road," so-called. Said company to maintain a gate across said way where it connects with said road, as provided in deed from Walter Cressy to said company, dated May 6, 1884, recorded in said registry, Book 1,129, leaf 235.

Also a right in one way 12 feet in width from the above granted premises over land now or formerly of Walter Cressy easterly to land now or formerly of Cressy and Bray, as shown upon plan described in item 8 herein. Including the reservoir and its foundations, with all gates, valves, fixtures, appliances and appurtenances used or connected therewith situate upon said land described in item 13 herein.

Item 14. All rights to take land, waters, water-rights and easements, to supply water, to lay pipes through private lands, and to dig therein, and all other rights and franchises conferred by law upon or vested in said Gloucester Water Supply Company by said chapter 167 of the Acts of the Legislature of Massachusetts for the Year 1881.

Item 15. The fourteen inch, wrought-iron, cement-lined conduit, about 5,474 feet in length, extending from Dike's meadow, upon land described in item 1 herein, through the way described in item 5 herein, to said pumping station building, upon land described in item 10 herein, with all gates, branches, fixtures, appliances and appurtenances connected with said conduit or in use therewith.

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Item 16. The fourteen inch, wrought-iron, cement-lined conduit, about four hundred and seventy-five feet in length, extending from Wallace Brook dam, so-called, upon land described in item 2 herein, through the way described in item 4 herein, and thence through Magnolia avenue to said pumping station building, upon land described in item 10 herein, with all gates, branches, fixtures, appliances and appurtenances connected with said conduit or in use therewith.

Item 17. The fourteen inch, wrought-iron, cement-lined conduit, about one hundred feet in length, extending from Lily Pond basin, so-called, upon land described in item 10 herein, to the pumping station building, also upon land described in item 10 herein, with all gates, branches, fixtures, appliances and appurtenances connected with said conduit or in use therewith.

Item 18. The sixteen-inch, wrought-iron, cement-lined force main,

about 5,380 feet in length, extending from said pumping station building, upon land described in item 10 herein, through the way described in item 6 herein, to said Bond's Hill reservoir, situate upon land described in item 13 herein, with all gates, branches, fixtures, appliances and appurtenances connected with said force main or in use therewith.

Item 19. The eighteen-inch, wrought-iron, cement-lined leading main, about 6,440 feet in length, extending from said Bond's Hill reservoir through the way described in item 13 herein; thence through Western avenue; thence through the way described in item 9 herein; and thence through said Western avenue to the corner of Main and Washington streets, connecting at said last named point with the distribution pipes of said company, with all gates, branches, fixtures, appliances and appurtenances connected with said main or in use therewith.

Item 20. All distribution pipes and all gates, connections, appliances, and appurtenances connected therewith, laid and maintained in the streets of said Gloucester, and used by said company for the supply of water, as follows (the lengths may vary slightly from the figures given).—

(1.) Four thousand eight hundred feet of fourteen-inch, wrought-iron, cement-lined pipe on Main street, from Washington street to Eastern avenue.

(2.) Eighteen hundred feet of twelve-inch, wrought-iron, cement-lined pipe on Washington street, from Main street to Commonwealth avenue.

(3.) Two thousand two hundred and fifty feet of ten-inch wrought-iron, cement-lined pipe on Washington street, from Commonwealth avenue to hydrant near B. Stanwood's house.

85 (4.) Two thousand five hundred and fifty feet of ten-inch, wrought-iron cement-lined pipe on East Main street, from Eastern avenue to Hammond street.

(5.) Fourteen thousand and eighty feet of ten-inch, wrought-iron cement-lined pipe on Magnolia avenue, from pumping station to Magnolia street.

(6.) Seven hundred and seventy-five feet of ten-inch, wrought-iron, cement-lined pipe on Fuller street, from Magnolia street to Hesperus avenue.

Eight-inch, wrought-iron cement-lined pipe laid and maintained as follows.—

(7.) Four thousand feet on East Main street, from Hammond street to Rocky Neck avenue.

(8.) Eighteen hundred and seventeen feet on East Main street, from Rocky Neck avenue to Gate lodge.

(9.) Twenty-two hundred and thirty-seven feet on Middle street, from Washington street to Pleasant street.

(10.) Three thousand six hundred and fifty feet on Prospect street, from Washington street to Main street.

(11.) Four hundred and twenty-five feet on Duncan street from Main street to Locust street.

(12.) Seven hundred and seventy-five feet on Park street, from Prospect street to Sheppard street.

(13.) Nine hundred and thirty-six feet on Pleasant street, from Main street to Prospect —.

(14.) Eight hundred and seventy-five feet on Eastern avenue, from Main street to Webster street.

Six-inch, wrought-iron, cement-lined pipe, laid and maintained as follows.—

(15.) Seven hundred and seventy-five feet on Addison street, from Washington street to School street.

(16.) Three hundred and thirty-seven feet on Allen street, from Prospect street to Liberty street.

(17.) One thousand seven hundred and sixty-eight feet on Bass avenue, from East Main street to Brightside avenue.

(18.) One thousand two hundred and seventy-five feet on Beacon street, from Washington street to Centennial avenue.

(19.) Eight hundred and eight feet on Brightside avenue, from Bass avenue to hydrant near Bass Rock hotel.

(20.) Two hundred and thirty-seven feet on Cedar street, from Park street to Sargent street.

(21.) Two hundred and twenty-five feet on Centre street, from Main street to Middle street.

(22.) One thousand three hundred and twenty-five feet on Chapel street, from East Main street to Mt. Pleasant avenue.

(23.) Eight hundred and twenty-five feet on Chestnut street, from Main street to Prospect street.

(24.) Eight hundred and twenty-five feet on Church street, from Middle street to Prospect street.

(25.) Five hundred and twenty-five feet on Cleveland street, from Maplewood avenue to opposite number — Cleveland street.

(26.) Nine hundred and seventy-five feet on Commercial street, from Main street to Fort square.

86 (27.) Seven hundred and seventy-five feet on Commonwealth avenue, from end of four-inch pipe on Commonwealth avenue to Lookout street.

(28.) Seven hundred and fifty feet on Dale avenue, from Middle street to Prospect street.

(29.) Nine hundred and fifty feet on Derby street, from Washington street to Maplewood avenue.

(30.) Five hundred and ten feet on Duncan street, from Locust street to end of pipe.

(31.) Eight hundred and fifty feet on Elm street from Main street to Prospect street.

(32.) Three hundred and sixty feet on Elwell street from Friend street to Sadler street.

(33.) Five hundred and twenty-five feet on Forrest street from Trask street to Millett street.

(34.) Five hundred and fifty feet on Fort square from Commercial street to George J. Tarr's oil works.

(35.) Three hundred and sixty-two feet on Foster street from Washington street to Winter street.

(36.) One thousand nine hundred and twenty-five feet on Friend street from Prospect street to Webster street.

(37.) Eight hundred and twenty-five feet on Granite street from Washington street to opposite the Marshall house on Granite street.

(38.) Nine hundred and sixty-two feet on Hammond street from East Main street to Haskell street.

(39.) Three hundred feet on Hancock street from Main street to Middle street.

(40.) Eight hundred feet on Millett street from Sargent street to Summit street.

(41.) Three hundred and fifty feet on Mt. Pleasant avenue from East Main street to Calder street.

(42.) One thousand two hundred and seventy-five feet on Mt. Vernon street from Prospect street to Perkins street.

(43.) Two hundred and seventy feet on Park street from Sargent street to Cedar street.

(44.) Seven hundred feet on Plum street from East Main street to Highland court.

(45.) Four hundred and twenty-five feet on Pearce street from Main street to Wharf street.

(46.) One thousand nine hundred and fifty feet on Perkins street from Taylor street to end of pipe.

(47.) One hundred and eighty feet on Porter street from Main street to Rogers street.

(48.) Four hundred and thirty-seven feet on Proctor street from School street to Church street.

(49.) Two hundred and fifty feet on Riggs street to Mansfield street to Summer street.

(50.) Eight hundred and sixty-two feet on Eastern avenue from Webster street to Hartz place.

(51.) One thousand seven hundred and twenty-five feet on Rocky Neck avenue from East Main street to James G. Tarr & Co.'s wharf.

(52.) One thousand one hundred and fifty feet on Rogers street from Porter street to Water street.

87 (53.) Five hundred and fifty-six feet on Sargent street from Sheppard street to Cleveland street.

(54.) Eight hundred and seventy-five feet on School street from Middle street to Railroad avenue.

(55.) Eight hundred and twenty-five feet on Sheppard street from Maplewood avenue to Sargent street.

(56.) Two hundred and seventy-five feet on Short street from Main street to Middle street.

(57.) Five hundred and sixty-two feet on Spring street from Main street to Prospect street.

(58.) Two hundred and eighty-seven feet on Staten street from Taylor street to Perkins street.

(59.) Seven hundred feet on Summer street from Granite street to Hovey street.

(60.) Two hundred and twenty-five feet on Taylor street from Prospect street to Staten street.

(61.) Three hundred feet on Trask street from Warner street to Forest street.

(62.) One thousand six hundred and seventy-five feet on Warner street from Prospect street to Miller street.

(63.) One thousand eight hundred and four feet on Washington square from Washington street to Granite street.

(64.) Four hundred seventy-five feet on Water street from Main street to Wharf street.

(65.) Six hundred and thirty-eight feet on Webster street from Eastern avenue to Friend street.

(66.) Two hundred feet on Wharf street from Pearce street to Waters street.

(67.) Nine hundred and seventy-five feet on Willow street from Sheppard street to Prospect street.

(68.) Two hundred and seventy-five feet on Winter street from Granite street to Foster street.

(69.) Nine hundred and sixty-two feet on Wonson street, from Rocky Neck avenue to Highland avenue.

(70.) Three hundred and forty-six feet on Boulder avenue, from Lexington avenue to end of pipe.

(71.) Four hundred and seventy-five feet on Cliff street from Lexington avenue to the Shore road.

(72.) Eight hundred and thirty-two feet on Fuller street from Hesperus avenue to the Shore road.

(73.) One thousand seven hundred and ninety-nine feet on Hesperus avenue, from Magnolia avenue to Merrill's gate.

(74.) One thousand six hundred and ninety feet on Lexington avenue, from Norman avenue to Shore road.

(75.) Seven hundred and fifty feet on Norman avenue, from Magnolia avenue to Lexington avenue.

(76.) Five hundred and sixty feet on Flume street, from Fuller avenue to Lexington avenue.

(77.) Seven hundred and seventy-two feet on Hesperus avenue, from Merrill's gate to end of pipe near Rowe's stable.

(78.) Four hundred and fifty feet on Cross street, from Eastern avenue to East Main street.

(79.) Two thousand nine hundred and fifteen feet on Western avenue, from eighteen-inch leading main, near foot of Bond's hill, to Hovey estate.

88 (80.) Three hundred feet on Maplewood avenue, from Sheppard street to Griffin's old shoe factory.

(81.) Four hundred and twenty-seven feet on Essex avenue, from eighteen-inch main at Western avenue to end of pipe.

(82.) One thousand three hundred and fifty feet on Whittemore street, from Washington street to the anchor works.

(83.) Two thousand seven hundred and ninety-one feet on Mt. Pleasant avenue, from East Main street to Calder street.

Four-inch, wrought-iron, cement-lined pipe, laid and maintained as follows—

(84.) Four hundred and forty-five feet on Vincent street from Main street to electric light station.

(85.) Three hundred feet on Beech street, from Commercial street to end of pipe.

(87.) Twenty-five feet on Commonwealth avenue, from Washington street to six-inch pipe on Commonwealth avenue.

(88.) Seven hundred and eighty feet on Exchange street, from Washington street to near Bridge street.

(89.) Five hundred feet on Tremont street, from Prospect street to Sheppard street.

(90.) Three hundred and twenty-six feet on Hovey street, from Summer street to end of pipe.

(91.) Nine hundred feet on Maplewood avenue, from end of six-inch pipe to Lane's house.

(92.) Three hundred and eighty-eight feet on Oak street, from Warner street to Mt. Vernon street.

(93.) One thousand four hundred and ninety-eight feet on Parker street, from East Main street to East Main street.

(94.) Five hundred and fifty feet on Pine street, from Church street to Washington street.

(95.) Four hundred and seventy feet on Sadler street, from Elwell street to Webster street.

(96.) Six hundred and fifty feet on Sargent street, from end of six-inch pipe to Groveland street.

(97.) Two hundred and thirty-seven feet on Taylor street, from Staten street to end of pipe.

(98.) One hundred and twenty feet on Summit street, from end of two-inch pipe on Summit street to a point on top of hill.

(99.) Five hundred and fifty feet on Hesperus avenue, from end of six-inch pipe to point opposite Mrs. Hayden's house.

(100.) Two hundred and fifty feet on Clarendon street, from Wonson street to Horton street.

(101.) One hundred and eighty-eight feet on Horton street, from Clarendon street to Rocky Neck avenue.

(102.) Nine hundred and ten feet on Western avenue, from Magnolia avenue to the Manchester line.

Two-inch, wrought-iron, cement-lined pipe, laid and maintained as follows.—

(103.) One hundred and forty-eight feet on Norwood's court, from East Main street to end of pipe.

(104.) Three hundred and eighty-six feet on Orchard street, from Washington street to end of pipe.

(105.) Three hundred and forty-nine feet on Willow street from end of six-inch pipe on Cleveland street to Willow street.

89 (106.) Two hundred and four feet on Lookout street, from Commonwealth avenue to end of pipe.

(107.) One hundred and twenty-six feet on Wharf street, from Water street to Burnham Brothers.

(108.) Three hundred and five feet on Hamden street, from Granite street to end of pipe.

(109.) Two hundred and fifty feet on Granite street, from end of six-inch pipe on Granite street to Hamden street.

(110.) Two hundred and four feet on Alpine court, from Commonwealth avenue to end of pipe.

(111.) Seven hundred and eighty-four feet on Washington street, from end of ten-inch pipe on Washington street to a point opposite Mr. Fisher's house.

(112.) One hundred and thirty-six feet on School street, from Proctor street to the church on the corner of Middle street.

(113.) Two hundred and sixty-four feet on Wall street, from East Main street to end of pipe.

(114.) Two hundred and ninety-nine feet on Pearl street, from Washington street to Railroad avenue.

(115.) Two hundred and eleven feet on Dike street, from Western avenue to end of pipe.

(116.) Two hundred and three feet on Webster street, from Friend street to a point near Sadler street.

(117.) One hundred and forty-seven feet on Maplewood court, from Maplewood avenue to end of pipe.

(118.) One hundred and eighty-five feet on the old Rockport road, from Maplewood avenue to Russell avenue.

(119.) One hundred and fifty feet on Beacon street, from end of six-inch pipe on Centennial avenue.

(120.) Three hundred and forty feet on Russell avenue, from old Rockport road to end of pipe.

(121.) Three hundred and twenty-two feet on Harold avenue, from Bridge street to end of pipe.

(122.) One hundred and twenty-five feet on Poplar street, from Maplewood avenue to Poplar court.

(123.) Three thousand one hundred and seventy-six feet on Bass rocks, from Brightside avenue to end of pipe on the shore.

(124.) Three hundred and two feet on Bridge street, from Washington street to the bridge.

(125.) Five hundred and eleven feet on Grove street, from Washington street to point opposite number 28 Grove street.

(126.) Two hundred and seventy-six feet on Harmony square, from Bass avenue to end of pipe.

(127.) One hundred and eighty-four feet on Sheppard street, from Sargent street to point opposite J. Hickey's house.

(128.) One hundred and fifty-seven feet on Centennial avenue, from Beacon street to a point opposite McPherson's house.

(129.) One hundred and fifty feet on Bickford street, from Trask street to end of pipe.

(130.) Two hundred and forty-nine feet on Pew court, from Main street to end of pipe.

(131.) Eighty-seven feet on Myrtle square, from Derby street to Hodgkin's house.

90 (132.) One thousand feet on Harrison avenue, from Eastern avenue to end of pipe.

(133.) Two hundred and fifty feet on Davis street, from Highland street to point opposite number 7 Davis street.

(134.) One hundred and eighty-six feet on Grove street, from Maplewood avenue to Acacia street.

(135.) One hundred and sixty-four feet on new street off of Hesperus avenue to point opposite Wadsworth's house.

(136.) Thirty-one feet off of Middle street, from Middle street to J. Mansfield's house.

(137.) Sixty-nine feet on Myrtle square, from Hodgkins' house to J. Nutton's house.

(138.) Two hundred and thirty-eight feet on Grove street, from Maplewood avenue to a point opposite number 66 Grove street.

(139.) Five hundred and twenty feet on Acacia street, from Grove street to Rockland street.

(140.) Two hundred and sixty-eight feet on Rockland street, from Maplewood avenue to Acacia street.

(141.) Four hundred and thirteen feet on Summit street, from Millett street to Trask street.

(142.) Five thousand nine hundred and sixty-five feet on Stanwood's point, from pumping station, Magnolia avenue, to a point opposite C. Rowe's house.

(143.) Four hundred and sixty-five feet on Commonwealth avenue, from Centennial avenue to end of pipe.

(144.) Eight hundred and fifty feet on Bridge street, from Commonwealth avenue to Harold avenue.

(145.) Six hundred and fifty-six feet on Centennial avenue, from Commonwealth avenue to Beacon street.

(146.) Seven hundred and thirty feet on Maplewood avenue from end of four-inch pipe to Poplar street.

(147.) Four hundred and thirty-three feet on Harrison place, from Bridge street to end of pipe.

One and one-half inch, wrought-iron, cement-lined pipe, laid and maintained as follows.—

(148.) One hundred feet on Brightside avenue, from end of six-inch pipe to Beech street.

(149.) One hundred feet on Blyman avenue, from Granite street to point opposite J. Scott's house.

(150.) Three hundred and eighty-seven feet on Columbia street, from Church street to School street.

(151.) One hundred and sixty-two feet on Fayal court, from Friend street to end of pipe.

(152.) One hundred and forty-five feet on Mansfield street, from Western avenue to point opposite the Hennesy house.

(153.) One hundred and fifty-one feet on Mason court, from Mason street to the end of pipe.

(154.) One hundred and seventy-one feet on Millett street, from Summit street to end of pipe.

(155.) Three hundred and twelve feet on Orchard street, from Winter street to end of pipe.

(156.) One hundred and sixty-two feet on Rockwood place, from Friend street to end of pipe.

91 (157.) One hundred and forty-two feet on Maplewood avenue, from end of four inch pipe to Poplar street.

(158.) One hundred and forty feet on Millett street, from Summit street to end of pipe.

(159.) Two hundred and eighteen feet on Rackliff street, from Fremont street to end of pipe.

(160.) Two hundred and sixty-five feet on Howe street, from Main street to end of pipe.

(161.) One hundred thirty-nine feet on Pew place, from Perkins street to end of pipe.

(162.) Four hundred and twenty feet on Sayward street, from East Main street to Bass avenue.

(163.) Two hundred and two feet on Wells court, from Commonwealth avenue to end of pipe.

(164.) One hundred and twenty-three feet on Cook's wharf, from Main street to the end of pipe.

(165.) One hundred and twenty feet on Lyman avenue, from Granite street to end of pipe.

(166.) Three hundred and thirty-nine feet on Orchard street, from Winter street to the end of pipe.

(167.) Three hundred and seventy-five feet on Smith street, from Maplewood avenue to Clark street.

One and one-quarter inch, wrought-iron, cement-lined pipe, laid and maintained as follows.—

(168.) Thirty-four feet on Arthur street, from Cleveland street to end of pipe.

(169.) Fifty feet on Morton place, from Harrison place to end of pipe.

(170.) Sixty-six feet on Trask street, from Summit street to Silva's house.

One-inch, wrought-iron, cement-lined pipe, laid and maintained as follows.—

(171.) One hundred and fifty-three feet on Sylvan street from end of one and one-half inch pipe to Sylvan court.

(172.) Eighty-one feet on Arthur court, from Arthur street to end of pipe.

(173.) One hundred and eighty-six feet on Franklin square, from Prospect street to J. Pew's house.

(174.) One hundred and forty-two feet on Commercial court, from Commercial street to end of pipe.

(175.) Two hundred and forty feet on Bickford street, from Trask street to the end of pipe.

(176.) Twenty-eight feet on Granite court, from Lyman avenue to end of pipe.

(177.) Five hundred feet at Bass rocks, from end of two-inch pipe to Judge Sherman's house.

(178.) Seventy-one feet on Maplewood court, from Maplewood avenue to end of pipe.

(179.) Three hundred and thirty-eight feet on Cedar street, from Willow street to Maplewood avenue.

All as shown on plans described in item 29 herein.

92 *Item 21.* Two hundred and forty-one water gates upon said distribution pipes, the locations of which are shown upon said plans described in item 29 herein and in a record book described in item 32 herein.

Item 22. One hundred and eighty-one fire hydrants connected with said distribution pipes, the locations of which are shown upon said plans described in item 29 herein and in said record books described in item 32 herein.

Item 23. Connections from distribution pipes with fourteen stand-pipes for supplying street watering carts, which stand-pipes are located as follows.—

One on Middle street, opposite building numbered 24 on said street; one at the corner of Spring and Prospect streets; one on Lexington avenue, at the corner of Norman avenue; one on Magnolia avenue, near the north driveway leading to W. B. Williams' house; one on East Main street, near the southerly end of Hammond street; one on East Main street, at the corner of Bass avenue; one on Park street, near Prospect street; one on Prospect street, near the old gun house, so-called; one at the square at East Gloucester; one on Washington street, near the building numbered 94 on said street; one at the junction of Maplewood avenue and Cleveland street; one on Washington street, opposite Whittemore street; one at the junction of Eastern avenue and Hartz place; and one on Western avenue, west of Essex avenue.

Item 24. Connections from distribution mains with six drinking fountains, which fountains are located as follows.—

One at the corner of Pleasant and Prospect streets; one on Main street, at the corner of Spring street; one on Eastern avenue, near Webster street; one on East Main street at the square; one on Western avenue, at Lufkin's blacksmith shop; and one at the corner of Washington and Angle streets.

Item 25. Seventeen air valves, with connections, located on distribution pipes and shown on said plan described in item 29 herein.

Item 26. Two thousand and ninety-six service-pipes, from said distribution pipes to premises of consumers, with connections, fittings, valves, fixtures and appurtenances, the locations of which service-pipes are shown in three application books and one service-pipe record book, which books are described in item 28 herein. Said service-pipes being numbered from one to two thousand and ninety-six inclusive in said books, and which books are now at the office of said company, at number 10 Proctor street aforesaid.

Item 27. Contracts in writing between said company and said City of Gloucester for supplying said city with water for fire purposes, which contracts are now on file at the city clerk's office in said city.

93 *Item 28.* Three record books, marked "A," "B," and "C" respectively, of applications for water, and one service-pipe record book containing a record of service-pipes laid. Said books are now at the office of said company, at number 10 said Proctor street.

Item 29. Two plans of the water supply system of the company, showing the locations of said distribution pipes and the locations of said gates, valves and hydrants, and of the stand-pipes described in item 23 herein, one entitled "Plan showing location of water pipes in ward one, compiled by Theo. Overbeck, civil engineer, April, 1886, scale 100 feet equal 1 inch." Both said plans being now at said company's office, at number 10 Proctor street aforesaid.

Item 30. Water rate register containing a list of the water-takers of said company, numbered from one to thirty-three hundred and seventeen inclusive, with a record of the annual water rate paid by each taker and the residence of such taker. Said register is now at said company's office, at said number 10 Proctor street.

Item 31. A meter register book showing a list of consumers taking water from said company by meter. Said book is now at said office of said company.

Item 32. Two location record books marked "A" and "B" respectively, showing the location of all said gates, hydrants and pipes. Said books are now at said company's office, number 10 Proctor street.

Item 33. Stock and construction tools in work shop at said number 10 Proctor street, Gloucester, as follows.—

199 service boxes; 36 ¾ inch elbows; 35 1-inch elbows; 22 1¼ inch elbows; 2 1½ inch elbows; 17 2-inch elbows; 15 2-inch 45 degree elbows; 5 1-inch 45 degree elbows; 3 1¼ inch right and left elbows; 120 three-quarter inch tees; 49 one-inch tees; 35 one and one-quarter inch tees; 11 two-inch tees; 12 one and one-half by three-quarter inch reducing tees; 18 one and one-half by one-inch reducing tees; 148 one by three-quarter inch reducing tees; 38 two-inch by one-inch reducing tees; 15 one and one-quarter by one-inch reducing tees; 9 two-inch by one-inch reducing tees; 8 one-inch by three-quarter-inch reducing tees; 16 one and one-half inch by one and one-quarter inch bushings; 14 two-inch by one and one-half inch bushings; 10 two-inch by one-inch bushings; 13 one and one-half inch by three-quarter-inch bushings; 22 one and one-quarter by one-inch bushings; 19 one-inch by three-quarter inch bushings; 11 three-quarter by one-half inch bushings; 4 two-inch nipples; 26 one and one-half inch close nipples; 14 one and one-quarter inch close nipples; 3 one-inch close nipples; 12 three-quarter-inch close nipples; 3 one-half inch close nipples; 24 solder nipples one inch to three-quarter; 56 three-quarter inch right and left couplings; 93 one-inch right and left couplings; 28 one-half inch right and left couplings; 11 one and one-quarter
94 inch right and left couplings; 3 one and one-half inch right and left couplings; 2 two-inch right and left couplings; 486

three-quarter inch spare couplings; 55 one-inch spare couplings; 84 one and one-half inch couplings; 67 one and one-quarter inch couplings; 193 two-inch couplings; 18 two-inch plugs; 49 one and one-half inch plugs; 46 one and one-quarter inch plugs; 64 one-inch plugs; 23 three-quarter inch plugs; 12 two-inch unions; 17 one and one-half inch unions; 19 one and one-quarter inch unions; 16 three-quarter inch unions; 3 one-half inch unions; 35 one-inch caps; 41 three quarter inch caps; 2 two-inch caps; 36 one-inch corporation cocks; 24 one and one-half inch corporation cocks; 18 one and one-quarter inch corporation cocks; 25 eight-inch corporation cocks; 19 five-eighths inch corporation cocks, without tail pieces; 3 three-quarter inch crosses; 3 one-half inch crosses; 1 one and one-quarter inch crosses; 3 one and one-half inch crosses; 38 three-quarter inch stop and waste cocks; 4 one-inch stop and waste cocks; 7 inch and one-quarter stop and waste cocks; 3 one and one-half inch stop and waste cocks; 29 one-inch stop and waste cocks; 5 eight-inch by six-inch cement-lined tees; 4 eight-inch by four-inch cast-iron tees; 1 six-inch by four-inch cast-iron tee; 1 eight-inch by eight-inch cast-iron tee; 2 six-inch by six-inch cast-iron tee-; 5 hydrant jackets; 3 hydrant posts; 1 eight-inch gate valve; 1 six-inch hydrant; 2 eight-inch gates; 3 six-inch cast-iron sleeves; 4 wrought-iron rings; 62 five-eighths inch goose-necks; 2 coffin hydrants, 1 Chapman hydrant; 8 gate tops; 2 eight-inch, cast-iron, one-sixteenth bend; 2 cast-iron globe 1–32 bend; 2 eight by six-inch globe tees; 2 lengths ten-inch cement pipe; ½ keg white lead; small can lard oil; one gallon oil can; 1 coil rope; 2 bales of winding rope; 1 two and one-half inch seat valve; 1 crank; 2½ pigs of lead; 5 four-inch cement plugs; 6 eight-inch cement plugs; 2 twelve-inch cement plugs; 2 six-inch cement plugs; 1 iron punch; 3 feet of 5-inch cast-iron pipe; 1 large winding stick; 3 small winding sticks; 1 Russell bilge pump hose and connections; one diaphragm pump hose and connections; 2 riveting irons; 3 barrels of cement; 373 feet of one-half inch iron pipe; 132 feet three-eighths inch iron pipe; 50 feet one and one-fourth plain iron pipe; 1 grindstone complete; 1 furnace for tool sharpening; 2 lawn sprinklers; 126 lengths of two-inch cement-lined pipe; 87 lengths of one-inch cement-lined pipe; 26 lengths of one and one-fourth inch cement-lined pipe; 5 lengths of one-inch plain pipe; 16 lengths of two-inch plain pipe; 7 iron chains; 3 tag ropes; 1 set of single block and fall; 1 set of double block and fall; 3 double blocks; 24 picks; 2 long-handled shovels; 63 round-pointed shovels; 24 pick handles; 7 square-pointed shovels; 1 coal shovel; 8 axes; 8 striking hammers; 2 sledge hammers; 412 five-inch, wrought-iron sleeves; 320 six-inch wrought-iron sleeves; 4 bundles ten-inch wrought-iron sleeves; 1 set derrick plates; 2 cast-iron tampers; 2 paving pounders; 73 blast drills; 1 spade; 1 snow shovel; 1 crow and plate; 2 large metal pots; 2 large ladles; 1 pressure pump and hose for same; 2 large hydrant caps; 1 small hydrant cap; 1 can turpentine; 1 pot black paint; 1 box of plugs and feathers; 1 hammer for drilling; 11 plug drills; 7 spoons for blasting; 3 pots nice black paint; 4 paint brushes; 4 crowbars; 1 can linseed oil; 1

tunnel bar; 1 whitewash brush; 1 sponge; 1 garden rake; 1 coal
95 sieve; 1 wrench for shut-off; 1 brass hydrant wrench; 4 padlocks; 3 Johnson pumps; 50 feet three-fourth inch hose; 3 service keys; 3 gate keys; 1 gate box cleaner; 1 pen of charcoal; 13 water buckets; 2 barrels of clay; 1 barrel coal; 25 extension pieces for service boxes; 1 pair scales; 40 lanterns; 1 box seats for service boxes; 3 wheelbarrows; 2 sand screens; 2 charcoal shovels; 2 derricks; 1 tar kettle; 1 five-gallon can; 2 one-gallon oil cans; 14 three-quarter-inch corporation cocks for cast-iron pipes; 13 spindles for valves; one-half box resin; 1 large vice and bench; 1 small vice and bench; 1 mortar box; 1 lining machine for small pipe and bench; 1 old stove; 1 iron ratchet stop drill; 6 feet of one-half inch hose; 1 coil of jute; 1 Chapman hydrant; 1 hot water heater and coil for heating water; 1 wash boiler and hose; 3 wash boilers; 2 one and one-half inch valves; 1 one and one-quarter inch valve; 1 number 1 die stock; 1 large die stock; 1 large ratchet die stock; 1 Jaricki die stock; 1 set of dies for Jaricki die stock; 1 set of dies for large die stock; 1 three-quarter inch, 1 one-inch, 1 one and one-quarter inch, 1 one and one-half inch, and 1 two-inch dies; 1 one-inch right and left die; ¼ keg small nails; 1 box nails; 7 lantern globes; ½ box hydrant bolts; 9 large drill handles; 4 large drill handles; 5 pick handles; 1 Douglass force pump; 6 meter counters; 1 coil of one-inch lead pipe; 1 batter coil wire for same; 1 small jug, 1 large bottle; 1 derrick rope; 2 large hydrant covers; 1 small hydrant cover; 1 pair large pipe tongs; 1 pair small pipe tongs; 1½ coils five-eighths inch lead pipe; 2 pair blacksmith tongs; 1 three-foot Stillson wrench; 2 two-foot Stillson wrenches; 2 eighteen-inch Stillson wrenches; 1 fourteen-inch Stillson wrench; 2 three-wheel pipe cutters; 1 small pipe cutter; 1 ten-inch monkey wrench; 1 fourteen-inch monkey wrench; 1 box caulking irons; 1 chisel and hammer; 2 pair snips; 1 rivet set; 2 clawhammers; 4 wrenches; 2 machine-hammers; 1 mallet; 2 paving hammers; 2 cold chisels; 1 pair hose pliers; 15 files; 2 screwdrivers; 1 turn pin; 2 rasps; 4 small hydrant keys; 7 soldering coppers; 6 pair rubber mittens; one-half dozen solid punches; 15 lbs. solder; 1 lot of block tin pipe; 3 coils of block tin pipe for thawing; 9 cast-iron corporation cocks; 4 three-quarter inch globe valves; 1 one-inch globe valve; 5 one-half inch globe valves; 3 plug valves; 3 one-inch plug valves; 1 one and one-quarter inch plug valve; 2 gate spindles; 2 sets of derrick rings; 1 large iron pot; 2 solder moulds; 9 cakes of block tin; 1 large fire king stove; 1 bench charcoal stove, with funnel; 5-gallon can of machine oil; 1 gallon black varnish; 1 hose spanner; 4 pair rubber boots; 1 small Nash meter; 24 four-inch sleeve; one-half dozen eight-inch sleeve; 1 window brush; 1 sheet-iron roller; 4 fourteen-inch iron rings; 3 sixteen-inch rings; 1 eighteen-inch ring; 2 pairs of window blinds; 2 kegs of iron rivets; 1 four-inch cone; 2 ten-inch cones; 1 eight-inch cone; 1 six-inch cone; 9 one-half inch drills; 1 one and one-half inch drill; 1 one and one-quarter inch drill; 1 one and one-half inch packing box; 1 one and one-quarter inch packing box; 2 one-

half inch packing boxes; 3 one-inch drills; window awning with frame; 1 hydrant top; 10 water meters, assorted sizes; 1 dozen covers for service boxes; small coal shovel; large poker; 4 coils sealing wire; 2 pair window blinds; 1 tag rope chain; 13 96 feet of six-inch stove pipe; 1 handle for mower; 1 bracket lamp; 1 small bag of waste; 2 large window frames; 4 grub hooks; 1 can tallow; 1 iron screen; 7 short knives for cementing pipe; 1 long knife for same; 1 large ball hammer; 1 small dark lantern; 1 dozen ¾ wheels for cutters; 10 picks; 6 hand drills; 4 service box screws; 1 inch and one-quarter brass meter coupling; 1 inch and one-half meter coupling, brass; 2 small oil feeders; 1 set saws, complete; 1 roll of rubber cloth; 4½ cast iron pipe; 6 feet eight inch cast-iron pipe; 20 feet four-inch cement-lined pipe; 25 feet six-inch, cement-lined pipe; 2 lengths of eight-inch, cement-lined pipe.

Item 34. Stock, supplies and tools at said pumping station building, on land described in item herein, as follows.—

50 feet of hose and nozzle for hydrant; 1 bundle of hair felt; 1 bag waste; 3 lbs. rubber packing; 3 lbs. steam packing; 27 feet of three-fourths inch Eureka packing; 5 lbs. Selden's steam packing; 3 lbs. hemp packing; 12 lbs. square flax packing; 1 roll of Jenkins' packing; 1 yard sheet rubber packing; 1 roll Rainbow packing; 20 lbs. second-hand rubber packing; 1 broom; 1 chandelier; 73 rubber water valves; 1 piece of wire screen, 6 feet by 2 feet; 10 lbs. Garlot steam packing; 1 two-inch brass union; 1 one and one-half inch brass union; 1 one and one-half inch brass valve; 2 three-quarter inch check valves; 1 three-eighth inch brass check valve; 1 one and one-half inch valve; 1 and one-half brass lock nut; 1 inch and one-quarter brass plug; 1 pair twelve-inch hinges; 1 box nails; 5 brass lamps; 12 rubber gaskets; 3 oil cans; 14 water glasses for boilers; 1 step-ladder; 1 door-mat; 2 two-quart oil cans; 2 one-gallon oil cans; 1 tunnel; 1 squirt oil can; 1 large screw-driver; 2 Stillson wrenches; 3 packing hooks; 1 eight-inch Stillson wrench; 1 twelve-inch and 1 twenty-inch Stillson wrench; 1 six-inch, 1 twelve-inch, and 1 twenty-inch monkey wrench; 1 duster; 2 water buckets and one slate; 2 thermometers; 2 chairs; 150 brass valve-springs; 4 rubber gaskets for hand-plates; 1 nickel lamp; 5 lamp chimneys; 3 lantern globes; 6 files; 4 steel springs for valves; 2 straight-way wrenches; 1 one-inch valve; 1 hammer; 4 cold chisels; 1 brass ⅜ inch union; 1 brass ⅜ inch valve; 3 steel punches; 1 street wrench; 7 cast-iron wrenches for pumps; 1 hydrant wrench; 9 eye bolts; 1 pair nippers; 1 pair chain tongs; 1 can of polishing oil; 1 can linseed oil; 10-gallon oil tank; 1 one-gallon oil can; 1 two-gallon oil can; 9 cast-iron socket wrenches; 1 lot washers; 1 lot of bolts; 7 coal scoops; 1 stone hammer; 1 damper chain; 1 pair scales; 2 tube scrapers; 1 tube blower; 1 set fire-irons; 1 coal barrow; 1 axe; 1 shovel; 72 feet one-inch pipe; 8 feet two-inch pipe; 16 feet three-fourth inch pipe; 12 feet one-fourth inch pipe; 72 feet one and one-fourth inch pipe; 2 oil barrels; 5 lanterns; 1 crow-bar; 1 ash scoop; ½ barrel machinery oil;

¼ barrel cylinder oil; ½ barrel kerosene oil; 2 picks; 2 scythes; 1 bush-cutter; 1 grub hoe; 2 pieces of chain; 1 six-inch earthern Y pipe; 1 four-inch earthern elbow; 1 four-inch trap; 2 tons stove coal; 1 garden rake; 30 tons soft coal; 5 feet four-inch wrought-iron pipe; 12 feet four-inch wrought-iron pipe; 1 coal screen; 2 oil barrels; 1 crowbar for furnace; 1 lot old lumber; 5 fire bricks; 1 bucket of odd fittings.

97 *Item 35.* Stock and supplies in yard at pumping station, on land described in item 10 herein, as follows.—

1 four-inch on twelve-inch branch cement; 2 lengths of 18-inch cement pipe; 2 lengths of 18-inch cast-iron pipe; 4 lengths of 16-inch cast-iron pipe; 19 lengths of 14-inch cement pipe; 1 length of 16-inch cement pipe; 9 lengths of 12-inch cement pipe; 1 sixteen-inch by six-inch cement branch; 1 fourteen-inch by six-inch cement branch; 1 cement-inch by fourteen-inch cast-iron branch; 1 six-teen-inch by twelve-inch cast-iron branch; 1 eighteen-inch cast-iron sleeve; 1 sixteen-inch cast-iron quarter bend; 1 fourteen-inch cast-iron quarter bend; 1 sixteen-inch foot valve; 1 twelve by ten-inch cast-iron branch; 1 sixteen-inch ⅛ bend; 2 ten by eight cement branches; 1 eight by six cement branch; 184 four-inch shells; 11 lengths of four-inch cement-lined pipe; 6 lengths of six-inch cement pipe; 10 lengths of eight-inch cement pipe; 10 lengths of ten-inch cement pipe; 20 lbs. of ⅜ inch rubber water packing; 2 six-inch by six-inch cement branches; 1 four-inch by four-inch cast-iron branches; 1 mortar box; 3 wheelbarrows; 1 old double wagon; 1 plank coal shute on railroad-bank.

Item 36. Stock, supplies and tools on Western avenue, near Essex avenue, on land belonging to the city of Gloucester, as follows.—

1 sand screen; 1 mortar box; 36 feet 18-inch cast-iron pipe; 24 feet 6-inch cast-iron pipe; 12 feet 8 inch cast-iron pipe; 20 feet 18-inch cement-lined pipe; 2 coffin hydrants; 247 feet 8-inch cast-iron pipe; 84 feet 6-inch cast-iron pipe; 1 length of 18-inch cast-iron pipe; 1 lining machine; 1 sand bin; 248 feet 6-inch cement-lined pipe; lot of wood for covering blasts.

Item 37. Stock, supplies and tools on East Main street near Reed and Gammidge's on said East Main street, as follows.—

753 feet 8-inch cast-iron pipe.

Item 38. Office furniture and fixtures now at the office of said company, at said No. 10 Proctor street, as follows.—

1 large desk in outer office; 1 safe; 1 rack for books; 1 black walnut counter, with railing with plate glass; 1 carpet on outer office; 6 curtains; 1 carpet in inner office; 6 chairs; 1 desk stool; 1 desk on counter; gas fixtures; gas shades; 1 letter file; 2 awnings; 1 waste basket; 1 spittoon; 1 clock; 1 water gauge; 1 paper file; 1 thermometer; 4 window screens; 1 hand stamp; 1 large door mat; 1 lamp; 1 ink filler; 1 water bucket; 2 brooms; 1 dust broom; 1 dust pan; 1 mop holder; 1 window brush; 1 scrub brush.

Item 39. All the debts due said company from water takers, as shown by the books of the company herein named. Also all in-

surance policies of said company by which any of the property herein described is insured against fire.

Item 40. The rights, privileges and easements acquired by said company under said chapter 167 of the Acts of the Legislature of Massachusetts for the Year 1881, and now in use by it, of laying and maintaining water pipes and mains in said streets, and of making connections therewith, for the purpose of supplying said city
98 and the inhabitants thereof with water, and all property, property rights, privileges, easements, waters, and water-rights of said company, and all the rights and franchises of said company whether for supplying water to the city of Gloucester and the inhabitants thereof and of collecting water rates therefor or otherwise.

Hereby intending to specify and describe all the corporate property, and all the rights, privileges, easements, lands, waters, water, rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures-hydrants, tools, and all appliances owned by said company and used in supplying said city and the inhabitants thereof with water.

In witness whereof, the said Gloucester Water Supply Company has caused these presents to be signed in its name, by David W. Low, its clerk, thereto duly authorized by vote of said company, a copy of which is hereto annexed, and its corporate seal to be hereto affixed, this fifteenth day of August, in the year of our Lord one thousand eight hundred and ninety-five.

(Signed) GLOUCESTER WATER SUPPLY COMPANY,
By DAVID W. LOW, *Clerk.*

Executed and filed with the city clerk of Gloucester, in presence of—

(Signed) JOHN E. McCUSKER.

At a meeting of the Gloucester Water Supply Company, duly called for the purpose, and held at the office of said company, number 10 Proctor street, in the city of Gloucester, Massachusetts, on Wednesday, the fourteenth day of August, A. D. 1895, at twelve-thirty o'clock in the afternoon, the following vote was passed.—

Whereas, the Gloucester Water Supply Company was incorporated under chapter 167 of the Acts of the Legislature for the Year 1881, for the purpose of furnishing the inhabitants of the city of Gloucester with pure water for the extinguishment of fires, and for domestic, mechanical, and other purposes, with all the powers and privileges, and subject to all the duties, restrictions and liabilities set forth in said act; and

Whereas, by said act it was provided that the City of Gloucester should have the right at any time during the continuance of the charter of said company to purchase the corporate property, and all the rights and privileges of said company, at such price as might be mutually agreed upon between said company and the City of

Gloucester, and that said company should be authorized to make sale of its said property, and all its rights and privileges, to said city, and that in case said company and said city should be unable to agree upon the compensation to be paid for the same, such compensation should be determined by three commissioners to be appointed by the supreme judicial court, upon application of either party and notice to the other, whose award when accepted by the court, should be binding upon both parties, and that the authority to said city to purchase said franchise and property of said
99 company, was granted on condition that the same should be assented to by said city by a two-thirds vote of the voters present and voting thereon, at a meeting called for that purpose in the several wards of said city; and

Whereas, it is provided by section 16 of chapter 451 of the Acts of the Legislature of Massachusetts for the Year 1895, that if, within thirty days after said act shall have been accepted by the City of Gloucester, as therein provided, the Gloucester Water Supply Company shall notify the mayor of the city of Gloucester, in writing, that it desires to sell to said city all its corporate property and all the rights, privileges, easements, lands, waters, water-rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all appliances owned by said company and used in supplying said city and the inhabitants thereof with water, and shall file with the city clerk of said city a specification and description thereof, said city shall not proceed to supply water to itself or its inhabitants under the authority of this act, unless it shall have first purchased of said company the property aforesaid; and

Whereas, the City of Gloucester, at a legal meeting called for that purpose on the twenty-third day of July, 1895, duly voted to adopt said act; and

Whereas, the Gloucester Water Supply Company claims that, in the event of the purchase by said city of its franchise and property, said city is liable to pay therefor a just, reasonable and full compensation, and that if said chapter 451 of the Statutes of 1895 undertakes to authorize said city to acquire said franchise and property for less than the just, reasonable and full compensation therefor, such provision is unconstitutional and void;

Now, therefore, in compliance with section 16 of said chapter 451 of the Statutes of 1895, it is hereby—

Voted, that this company desires to sell to the said City of Gloucester all the corporate property, and all the rights, privileges, easements, lands, waters, water-rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all appliances owned by said company and used in supplying said city and the inhabitants thereof with water, and that David W. Low, the clerk of said company, is hereby authorized and directed to notify the mayor of said city of Gloucester, in writing, that the company so desires to sell said property and franchises, and that David W. Low, clerk of said company, is hereby authorized and directed to sign and file

with the city clerk of said city a specification and description of all the property aforesaid.

Attest: DAVID W. LOW,
Clerk of the Gloucester Water Supply Company.

Filed Oct. 29, 1895.
(Signed) DEAN PEABODY, *Clerk.*

100 EXHIBIT N.

Supreme Judicial Court.

ESSEX, *ss:*

GLOUCESTER WATER SUPPLY COMPANY
v.
CITY OF GLOUCESTER.

The City of Gloucester, the respondent, moves that the report and award of the commissioners, filed June 29, 1900, be accepted, for reasons appearing upon the face thereof, as an award of the sum of three hundred and twenty-five thousand eight hundred and fifty dollars ($325,850), to be paid the petitioner by the respondent, or as an award of such sum, less than six hundred thousand five hundred dollars ($600,500), as law and justice may require.

And, in the alternative, the respondent moves that the report and award be recommitted to the commissioners, with directions to revise the same by disallowing the sum of $175,000 allowed and awarded the petitioner for water and water rights pertaining to the Dikes and Wallace reservoirs; the sum of $20,000 allowed and awarded for the Lily Pond water and water rights valued for the purpose of domestic supply; the sum of $4650 allowed and awarded for the Lily Pond water rights not valued as for domestic supply; and the sum of $75,000 allowed and awarded as the peculiar value of the property to, and for the purposes of its use by, the City of Gloucester, as enhanced by reason and in view of the business done or to be done by its use; to strike out the clause which attempts to award interest on the amount of the valuation; and to revise their award of fees for their services in the case; or with such other orders and directions as law and justice may require; on the ground that the commissioners erred in allowing and awarding the petitioner each and all of said sums; in attempting to deal with the question of interest on the award; in refusing to rule and proceed as requested by the respondent in its requests numbered 1 to 7 inclusive, 10, 11, and 13 annexed to the report; and in awarding the sum of $27,000 as their fees for their services in the case; and for other sufficient grounds and reasons.

(Signed) CITY OF GLOUCESTER,
By A. E. PILLSBURY,
CHAS. A. RUSSELL.

101 EXHIBIT O.

GLOUCESTER WATER SUPPLY CO.
v.
CITY OF GLOUCESTER.

LORING, *J.*:

1. The defendant's first contention is that in estimating the value of the Dikes and Wallace reservoirs the water company is not entitled to include the value of any water or water rights.

These two reservoirs formed the water supply which was in use on September 25, 1895, when the petitioner's plant was transferred to the defendant city. The water which feeds these reservoirs was obtained by digging out two swamps and damming up their outlets. No brook flowed into either swamp in its natural state, but the water collected in the reservoirs "gathers" there, coming from the water sheds of the neighboring land; both swamps were taken in 1884 by the water company, and written descriptions of their bounds were filed in the registry of deeds under St. 1881, c. 167, s. 3; in these descriptions it is stated among other things that "the above land, or real estate, has been taken, * * * for forming and erecting dams, reservoirs, to take and hold water for the purposes above set forth, * * * and such other use and purpose as may be necessary and may be authorized by said act."

We are of opinion that this was a valid taking of the water which "gathers" in the reservoirs. Where land is taken for a reservoir "to take and hold water," all water which "gathers" in the reservoir from springs or by percolation, and none of which flows into the reservoir from a stream, is also impliedly taken. In such a case, the requirements of an adverse taking of such water under the right of eminent domain are complied with.—See Glover *v.* Boston, 14 Gray, 282, 288; Kennison *v.* Arlington, 144 Mass. 456; Hollingsworth Co. *v.* Foxboro, 165 Mass. 186, 189; Lexington Print Works *v.* Canton, 167 Mass. 341, 344. Where a reservoir is fed by the waters of a brook which has been taken, in terms, by the water company, and is also fed by waters which "gathers" in the reservoir, as water gathers in a well, it would be impracticable to hold that the only water to which the company has a title was the water of the brook, and that it has no title to the water which gathered in the reservoir. Land cannot be used as a reservoir by a water company without the water company having a right to the water which "gathers" in the bottom of it by percolation or from springs.

We are therefore of opinion that in estimating the value of Dikes and Wallace reservoirs the water company is entitled to the value of the water which "gathers" there.

The objection originally taken by the defendant to the water company's title to the land on which the pumping-station stands was waived at the argument.

102 2. As to the waters of Lily pond.—We are of opinion, on the one hand, that the water company had no right to use these waters for domestic purposes, and therefore that $20,000. must be deducted from the amount of the award; but, on the other hand, we are of opinion that the water company did own the right to flow Lily pond and to use its waters for mill purposes, and therefore that the $4,650. allowed by the commissioners is not to be deducted from the amount of the award.

The only ground on which the water company claims the right to use these waters for domestic purposes is that for part of the year 1885–1886, while Dikes and Wallace reservoirs were being built, it used the waters of this pond in supplying the defendant city and its inhabitants with water. The water company contends that "the actual appropriation and diversion of the waters was sufficient to constitute a legal taking," and relies upon Moore *v.* Boston, 8 Cush. 274; Bailey *v.* Woburn, 126 Mass. 416; Cowdrey *v.* Woburn, 136 Mass. 409; and Northboro *v.* County Commissioners, 138 Mass. 263. In addition to these cases cited by the water company is the case of Brickett *v.* Haverhill Aqueduct Co., 142 Mass. 394. The defendant relies principally upon the decision in the case of Warren *v.* The Spencer Water Co., 143 Mass. 9, and upon the case of Hamor *v.* The Bar Harbor Water Co., 78 Maine, 127.

Whether the actual diversion of water is a legal taking of it, is a question on which the cases in this Commonwealth are not in entire harmony.

It seems to have been held in Brickett *v.* Haverhill Aqueduct Co., 142 Mass. 394, that the actual diversion of water was in that case a legal taking of it. It appears from the original papers in that case that a permanent dam had been built across the outlet of the pond whose waters were claimed by the plaintiff to have been tortiously used to his, the plaintiff's detriment, and a pumping-station had been built in connection with it; and it was stated in the bill of exceptions "that the operations of the company as aforesaid were under the assumed authority of said chapter, (St. 1867, s. 73,) and were necessary for the purpose of said act." In that case, there was no pretence that the defendant had passed any vote stating that the waters of the pond in question, or any part of them, had been taken. The act in question (St. 1867, c. 73) gave the defendant aqueduct company authority to take the waters of the pond and to enter upon and dig up any land through which it might decide to lay its pipes; but it did not require any description, either of the land or of the water rights taken by it, to be filed in the registry of deeds or elsewhere. It appears from the brief of the defendant in that case that there are many acts in this Commonwealth drawn like the act there in question. St. 1839, c. 114; St. 1845, c. 90; St. 1850, c. 192; St. 1850, c. 198; St. 1850, c. 273; St. 1852, c. 210; St. 1856, c. 241; St. 1857, c. 135 are all acts which, like 1867, c. 73, authorize the taking of water and land without stating in what the taking shall consist or requiring a description either of the land or of the water taken to be filed in the registry of deeds or elsewhere.

On the other hand, Warren *v.* The Spencer Water Company, 143 Mass. 9 seems to be a decision the other way. The statute
103 there in question (St. 1882, c. 119) authorized the water company to take the waters of any brook, and to take any real estate necessary for its use, and provided that the company "should cause to be recorded in the registry of deeds for the county of Worcester a description of any land so taken," but made no provision as to requiring, there or elsewhere, a description of the waters taken by the water company. The declaration in Warren *v.* The Spencer Water Company contained two counts; one for entering upon the plaintiff's land and laying pipes therein, and the second for deflecting the waters of a brook which had formerly flowed through her (the plaintiff's) pasture. The presiding judge ruled, with respect to the second count, that "the turning of the water of Shaw pond by the defendant's servants into its pipes, in the absence of any other act or proceeding of the corporation in relation thereto, was not such a taking of the water or of water rights, under the statute, as would preclude the plaintiff from maintaining an action of tort for the diversion of the waters from the brook running through her pasture;" and an exception to that ruling was overruled, although the question was not discussed in the opinion delivered by this court. And it is of some importance that there are many statutes like the statute in question in Warren *v.* The Spencer Water Co., which provide that the water company may take land and water, and then provide that if land is taken a description of it shall be filed in the registry of deeds, making no provision as to what must be done with respect to the taking of water taken by the water company under the act. Among such statutes are St. 1865, c. 132; St. 1866, c. 175; St. 1867, c. 84; St. 1867, c. 272; St. 1868, c. 182; St. 1871, c. 218; St. 1871, c. 30; St. 1872, c. 345; St. 1873, c. 242; St. 1874, c. 191; St. 1876, c. 42; St. 1880, c. 127; St. 1880, c. 179; St. 1880, c. 203; and St. 1882, c. 119 and c. 142.

And finally, in Moore *v.* Boston, there is a statement that the legal taking is the actual use of the property taken, as is shown by the fact that it is a description of a previous taking that is to be filed in the registry of deeds. The act in question in Moore *v.* Boston was not drawn like either of the two classes of acts already spoken of. That act (St. 1846, c. 167) authorized the defendant city to take water and land in order to supply its inhabitants with water, and provided.—"The city of Boston shall, within sixty days from the time they shall take any lands, or ponds, or streams of water, for the purposes of this act, file in the office of the registry of deeds, for the county where they are situate, a description of the lands, ponds, or streams of water so taken." A parcel of land belonging to the plaintiff's estate was actually used by the defendant city for the purpose of building an aqueduct passing through it, during her lifetime, and a description of the land so taken was filed in the registry of deeds after her death. It was held that the petition for compensation was properly brought by the administrator, and on the ground that the exercise of the physical dominion over the property which it was

claimed had been taken was the legal taking of that property. There is a similar statement in Northboro *v.* County Commissioners, 138 Mass., 263, in which it was held that a petition for damages
104 must be brought within one year after water has been actually diverted, under a statute which provides that the petition shall be brought "within one year after the taking of such land, water source, or water right, or other injury done as aforesaid, and not thereafter. No assessment for damage shall be made for the taking of any water right or any injury thereto until the water is actually withdrawn or diverted." The conclusion reached in that case puts the statute there in question on the same footing as the act in the case at bar (St. 1881, c. 167, s. 3), which is a common, if not a usual, form of limitation of such petitions. In the act in the case at bar, it is provided that the petition shall be brought "within three years from the time the water is actually withdrawn or diverted, and not thereafter."

Bailey *v.* Woburn, 126 Mass. 416, and Cowdrey *v.* Woburn, 136 Mass. 409, are cases where the owner of the land did not undertake to assert that his land had not been taken, but where he was seeking to obtain damages on the footing that it had been taken, and may well rest upon the ground that in such a case the water company or the defendant city is estopped to deny that there is no legal taking, even if there has been no legal taking. Spaulding *v.* Arlington, 126 Mass. 492, 494; Lewis *v.* Boston, 130 Mass. 339. And Moore *v.* Boston, 8 Cush. 274; *and Moore v. Boston, 8 Cush. 274;* and Northboro *v.* County Commissioners, 138 Mass. 263, 255, are also cases where the owner of the land was seeking to obtain compensation on the footing that his property had been taken, and are not cases where he was asserting his right to his property as still his own, in spite of what had been done by the defendant city or company, and therefore are not cases which are decisive of the question whether a man can be deprived of his property by an act *in pais*, unaccompanied by a writing or other declaration defining the measure of interference with his ownership of the property which it is claimed has been taken under the exercise of the right of eminent domain; see Glover *v.* Boston, 14 Grey, 282, 288; Kennison *v.* Arlington, 144 Mass. 456; Hollingsworth Co. *v.* Foxboro, 165 Mass. 186, 189; and Lexington Print Works *v.* Canton, 167 Mass. 341, 344.

In connection with Moore *v.* Boston and Northboro *v.* County Commissioners, which was decided on the authority of Moore *v.* Boston, it is important to note that the case of Davidson *v.* Boston & Maine R. R. Co., 3 Cush. 91, on which the decision in Moore *v.* Boston was largely based, is a case which was subsequently explained to be a case resting on the doctrine of estoppel; that is to say, a case in which the defendant Railroad Co., having used the plaintiff's land, was estopped to say that it had not taken his land, when the use it had made of it could only be justified by it if it had, in fact, taken his land. To that effect, see Shaw, C. J. in Boston & Providence R. R. *v.* Midland R. R., 1 Gray, 340, 361; see also Drury *v.* Midland R. R., 127 Mass. 571, 580. Moreover, it is well settled, in case a rail-

road constructs its roadbed on the land of the plaintiff, that the plaintiff may, at his election, assert his title to his land and to the rails affixed to it by the railroad; Meriam *v.* Brown, 128 Mass. 391; or he may at his election bring a petition for compensation
105 on the ground that the defendant is estopped to say that the land has not been taken. Boston & Providence R. R. *v.* Midland R. R., 1 Gray, 340, 361; Drury *v.* Midland R. R., 127 Mass. 571, 580. In the case of a railroad, the filing of the location is the act of taking; Charlestown R. R. *v.* County Commrs. 7 Met. 78; Hazen *v.* Boston & Maine R. R., 2 Gray, 574, 580; Chandler *v.* Jamaica Pond Aqueduct Corp., 114 Mass. 575, 577. Finally in Saunders *v.* Lowell, 131 Mass. 387, 388, Moore *v.* Boston is treated as a case resting on this doctrine of estoppel.

It is not necessary in this case to decide the abstract question which we have been discussing. However that question may be decided, we are of opinion that such an equivocal act as the temporary use of water for less than a year, which use is then abandoned and has never since been resumed, is not a legal taking of that water under St. 1881, c. 167, s. 2, as against a person who has rights in the water in question and who had not elected to treat it as a taking of it; The defendant city in objecting to the title of the water company to the waters of Lily pond has a right to test its title by the question whether the rights of such a person have been extinguished.

For these reasons we are of opinion that the $20,000 allowed as the value of the waters of Lily pond for domestic purposes must be deducted from the amount of the award.

But we are of opinion that the $4650. allowed for the value of the right to use the waters of Lily pond for a mill privilege must stand.

The defendant city contends that the mill privilege which was conveyed to the water company by the Webster Company deed had been previously extinguished by abandonment; it bases this claim on the fact that in 1873 a fire destroyed the saw mill and the net and twine mill then built at the mill pond, and that no use was made of the waters of Lily pond after that until they were temporarily used by the water company in supplying the defendant city and its inhabitants with water during a part of the year 1885 to 1886, while Dikes and Wallace reservoirs were being constructed. The defendant also contends that under its charter the water company could not acquire title to any land or water rights by purchase, and could not acquire a mill privilege at all; and finally, that under the terms of the original grant in 1682, a fee did not pass in the easement thereby created, but only a life estate. But we are of opinion that the mill privilege has not been extinguished by abandonment; the easement was created by grant, and in such a case it is not lost by non user. Butterfield *v.* Reid, 160 Mass. 361, 369. The cases of French *v.* Braintree Mfg. Co., 23 Pick. 216; Fitch *v.* Stevens, 4 Met. 426; Hodges *v.* Hodges, 5 Met. 205, were cases involving a right to maintain a dam under the mill acts and rest on other principles. The right of the water company to acquire land or water rights by purchase is plain; it is recognized in the

third section of its charter. And we are of opinion, that, as an incident to its business of securing and selling water, it could purchase and hold this privilege of damming the waters and flooding the Lily Pond meadow, although the running of a mill was beyond its charter powers; Brown *v.* Winnisimmet Co., 11 Allen, 326. And further, that although no words of inheritance were used in the original grant by the town of Gloucester "to Jacob Davis &
106 others joyninge with him," made in 1682, a fee in the easement passed to the grantees; it is well-settled that the rigid rules of construction which are applicable to modern conveyances are not to be applied to transactions of the kind in question which took place early after the settlement of the country; when conveyancing was little understood. Adams *v.* Frothingham, 3 Mass. 352; Stoughton *v.* Baker, 4 Mass. 521. Feofees of Grammar School *v.* Andrews, 8 Met. 584, 592; Green *v.* Putnam, 8 Cush. 21, 25. For the same reason, the easement granted was not limited to damming the waters of the stream for the purpose of running a saw mill; Adams *v.* Frothingham, 3 Mass. 352. But the ownership of the mill privileges did not give the water company the right to withdraw all the water that collects in Lily pond and sell it to the defendant city and its inhabitants, and for that reason, the $20,000 allowed by the commissioners must be deducted as we have already stated.

The defendant further contends that the $4650. allowed by the commissioners must be deducted from the award because the waters of Lily pond were not in actual use when the property of the water company was transferred to the city, because the title to use the waters of Lily pond as a part of the mill privilege in the waters of Little river does not confer a perfect title to the waters of Lily pond upon the city, and finally because the waters of that pond can not be made fit for the purposes of a domestic water supply without acquiring the fee in the bottom of the pond. But it is plain that the city has the power to acquire the fee in the bottom of the pond, and it is also plain that the waters of Lily pond had been used in furnishing the defendant city and its inhabitants with water in 1885 and 1886, and that without the ownership of the mill privilege in Little river these waters could not have been so used. The mill privilege is of value as a step towards the ownership of the waters of Lily pond as an auxiliary supply, and those waters having once been used by the water company in supplying the defendant city and its inhabitants with water, the mill privilege is the property of the water company, owned and used within St. 1895, c. 451, s. 16.

3. It will be convenient to consider the defendant's contention that the commissioners had no right to award the $75,000 allowed by them in addition to the cost of reproduction of the water company's plant, less depreciation, in connection with the water company's contention that evidence of past earnings of the water company should have been admitted in evidence.

The act under which the award was made (St. 1895, c. 145) is an act enabling the City of Gloucester to "supply itself and its inhab-

itants with water." By section 16 of that act, that right is made conditional on its (the city's) purchasing the property of the water company in case the water company elects to sell its property to the city; in case the city agrees to buy the water company's property, under an offer from the water Co. made under the provisions of that section, it is provided that "said city shall pay to said company the fair value thereof;" "such value shall be estimated without enhancement on account of future earning capacity or future good will or on account of the franchise of said company."

107 In determining the true construction of these provisions of s. 16, it is important to bear in mind the purpose which the legislature had in making the right of the city to supply itself with water conditional on its buying the company's property in case the company elected to sell it to the city; and in providing that in ascertaining the "fair value" of that property, it should not be enhanced "on account of either future earning capacity or future good-will, or on account of the franchise of said company."

On the one hand, it is plain that a private water company organized for net profits cannot hope to compete with a city, which can rely upon taxes to supply a deficit in operating expenses. For that reason, it is also plain that if the legislature had not required the city to buy the water company's property, the company's property would have been practically, though not legally, confiscated. No doubt, therefore, can arise as to the reasons for the insertion of the clause in s. 16 providing that the value shall not be enhanced "on account of the franchise of said company." The franchise of the Gloucester Water Supply Company was not an exclusive franchise. The grant of a similar franchise to the city of Gloucester to supply itself and its inhabitants with water was not a violation of the franchise rights of the Gloucester Water Supply Company; and finally, the sale to the city was not obligatory on the water company; the company was given the option of selling its property to the city or of going on in competition with the city, under the act in question. Under these circumstances, it is plain that the value of the company's property which the city is compelled to buy ought not to be enhanced "on account of the franchise of said company."

It is also plain, so long as a water company has no competitor in supplying a town or city with water, it is practically in the enjoyment of an exclusive franchise, although its franchise is not legally an exclusive one. For that reason, the earnings of this company were not evidence of the "fair value" of this property; the earnings of a company which is in the enjoyment of what is practically an exclusive franchise are not a fair criterion of the "fair value" of the property, apart from an exclusive franchise. For that reason, we are of opinion that the evidence of past earnings offered by the water company *were* properly excluded. Newburyport Water Co. *v.* Newburyport, 168 Mass. 541.

It is argued by the petitioner that the admissibility of such evidence derives support from St. 1891, c. 390, s. 12, which provides that in determining the "fair market value" of a gas or electric

plant under similar circumstances "the earning capacity of such plant, based upon the actual earnings being derived from such use at the time of the final vote of such city or town to establish a plant" is to be included "as an element of value;" but this clause as to the earning capacity being considered as an element of value was omitted from the act in question.

The only doubt as to the propriety of the allowance of a sum in addition to the cost of duplication, less depreciation, of the water company's plant is whether the principles on which the commissioners proceeded was sufficiently favorable to the water company.

It is plain that the real commercial market value of the water company is, or may be, in fact, greater than "the cost of re-
108 production, less depreciation, of the different features of the physical plant." Take, for example, a manufacturing plant. Suppose one manufacturing plant has been established for some ten years and is doing a good business and is sold as a going concern. It will sell for more on the market than a similar plant reproduced physically would sell for immediately on its completion, before it had acquired any business. National Water Works *v.* Kansas City, 62 Fed. Rep. 853.

We think it is plain that there is nothing in the provisions of s. 16 of the act in question (St. 1881, c. 167) forbidding the commissioners considering this element of value which (as we have seen) in fact exists. The provisions of the act are that the "fair value" "shall be estimated without enhancement on account of future earning capacity or future good will, or on account of the franchise of said company." Whether that would allow present earning capacity and present good-will apart from the franchise, to be taken into account, as distinguished from future earning capacity and future good-will, need not be considered. It is plain that the element of value which comes from the fact that the property is sold as a going concern, in which case it has, or may have, in fact, a greater market value than the same property reproduced in its physical features is not excluded from consideration by that provision of the statute.

It is also plain that the commissioners, in allowing the $75,000, allowed by them in addition to the cost of reproduction, less depreciation, of the plant in its physical features did not go beyond this. They state that in their opinion "the cost of duplication, less depreciation, of the different features of the physical plant * * * does not represent a fair valuation of this plant, welded together, not only fit and prepared to do business, but having brought that business into such a condition that there is an enhanced value created thereby, so that the city, in purchasing it, without considering its income or right to do business but having the power to carry it on on its own account, should pay more for the property as such than as if this consideration did not obtain. This is a valuation that we have found to be seventy-five thousand dollars ($75,000) that has been imported into the plant, which seems to us as much a part of the property valuation as any other part of it."

4. We are of opinion that the commissioners could properly

adopt, as a basis of their valuation, the value of the property at the date of its transfer to the city, adding interest to the date of payment.

5. The objection made by the defendant to the reasonableness of the fees charged by the commissioners must be raised before a single justice of this court.

6. The right to have the report recommitted because the company had a right to take additional sources of water supply in ward eight, to lay and maintain pipes in the streets, and to charge water rates, was not raised in the commissioners' report, nor is it mentioned in the motion to recommit that report, and therefore it is not
109 open, under the terms of the report reserving the case for this court; but we think that the water company got all the advantage to which it was entitled by its authority to take additional sources of water supply; the commissioners found that "the failure to take and create property by the exercise of its franchise rights gives nothing that we can appraise under the statute. We, however, permitted the petitioner's experts to take into consideration the effect upon the value, if any, of the water rights owned by the company by the presence of these additional supplies. We did not, after considering the amount of the available water supply of the company in 1895, enhance the value of its supply on account of the presence of the supplementary sources, but the fact that they could be so employed prevented any impairment under any claim that the company's sources would be shortly exhausted, and therefore likely to be abandoned."

Apart from these considerations, we think the commissioners were correct in not considering these rights of the water company; these rights could be revoked, and were revoked by St. 1895, c. 451.

It follows that the following sums are to be deducted from the total award made by the commissioners.—(1) $20,000 for water rights in Lily pond; (2) $3,955.40, an amount agreed upon between the parties. The report of the commissioners should be affirmed as a report for $576,544.60, with interest from September 24, 1895; but the case is to stand for hearing on the amount to which the petitioner is entitled by its payment of the costs charged by the commissioners.

So ordered.

110 At the same term the following demurrer was filed:

Demurrer.

(Filed Sept. 3, 1901.)

The City of Gloucester, defendant in the above entitled cause, demurs to the plaintiff's bill and assigns as grounds of demurrer the following:

First. The bill does not set forth or show a case arising under the

Constitution or laws of the United States of which this court has or can take jurisdiction to administer any relief to the plaintiff; in that it does not appear by the bill that the State of Massachusetts has passed any law impairing the obligation of any contract of the plaintiff, or that there has been any taking of any property of the plaintiff or that said State has deprived the plaintiff of its property without due process of law, or has denied to the plaintiff or its stockholders the equal protection of the laws, or that any right of the plaintiff existing or arising under the Constitution or laws of the United States has been denied or infringed by the State of Massachusetts, or by the defendant under its authority, or otherwise.

Second. It appears by the bill that any right of the plaintiff existing or arising under the Constitution or laws of the United States in or concerning the proceedings under the Massachusetts statute chapter 451 of the Acts of 1895 set forth in the bill, could have been claimed and asserted with full effect in such proceedings; and that the laches and delay of the plaintiff in failing seasonably to claim or assert the same is a bar to any right now to assert or enforce the same in or by means of this proceeding.

111 Third. It appears by the bill that the same is an attempt to review and revise in this court certain proceedings between the plaintiff and the defendant under said Massachusetts statute of 1895 and in the supreme judicial court of the State of Massachusetts, which court had jurisdiction thereof, and to avoid the results thereof; which proceedings, as appears by the bill, were voluntary in law on the part of the plaintiff and were and are lawful, valid and binding upon the plaintiff, and cannot be reviewed, reversed or avoided in this court under the circumstances disclosed in the bill; and the plaintiff by its voluntary acts and conduct, as therein disclosed, is estopped to deny or question the validity thereof.

Fourth. The bill does not set forth or show a case entitling the plaintiff to any relief in equity against the defendant.

Wherefore, and for other good causes of demurrer appearing therein, the defendant demurs to the plaintiff's bill and prays the judgment of the court whether it ought to be held to make further answer thereto.

CITY OF GLOUCESTER,
By A. E. PILLSBURY,
Solicitor and of Counsel.

I certify that in my opinion the foregoing demurrer is well founded in point of law.

A. E. PILLSBURY,
Of Counsel for the Defendant.

112 UNITED STATES OF AMERICA, }
District of Massachusetts. }

BOSTON, *September 3d*, 1901.

I, Albert E. Pillsbury, in behalf of The City of Gloucester, defendant in the above entitled cause, on oath say that the foregoing demurrer is not interposed for delay.

ALBERT E. PILLSBURY.

Subscribed and sworn to before me
[SEAL.] CHAS. C. BUCKNAM,
Notary Public.

This cause was thence continued from time to time to the present May term, A. D. 1902, when the same is set down for hearing and fully heard by the court, on demurrer, the Honorable Le Baron B. Colt, circuit judge, sitting, and, after due consideration thereof had the following rescript is filed:

Rescript.

June 23, 1902.

COLT, *J.*:

This case, in our opinion, is governed by the case of The Newburyport Water Company *v.* City of Newburyport and the demurrer to the bill is therefore sustained.

On the thirtieth day of September, A. D. 1902, the following agreement to amend record is filed:

Agreement to Amend Record.

(Filed Sept. 30, 1902.)

It is agreed that the vote of the city of Gloucester to purchase the plaintiff's property, referred to in paragraph 15 of the plaintiff's bill, was in the form hereto annexed; and that on Sept. 5, 1895,
113 the city council of the defendant city passed an order in the form hereto annexed, of which a copy was served on the plaintiff company September 7th, as appears by the certificate thereto annexed; and that said form of vote and order shall be incorporated into the record, with the same effect as though they had been originally set out in the plaintiff's bill.

ROBERT M. MORSE,
For the Plaintiff.
A. E. PILLSBURY,
For the Defendant.

Special Election Tuesday, Sept. 24, 1895, *on Purchase of Water Plant.*

Meetings of the legal voters in the city of Gloucester were held in the several precincts of the city on Tuesday the twentyfourth day of September, A. D. 1895, called by warrants of the mayor and aldermen, to give in their votes for or against, in answer to the following question, namely: "Shall the City of Gloucester purchase all the corporate property and all the rights, privileges, easements, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all appliances owned by the Gloucester Water Supply Company, and used in supplying said city and the inhabitants thereof with water, under and in accordance with the provisions of section 16, chapter 451 of the Acts of 1895?".

The returns of the several precinct officers were examined at a meeting of the board of aldermen held on Friday, September 27, 1895, and were as follows, namely:

Yes, 1073,
No, 116,
Blanks, 2.

A true copy of the returns as recorded in record of elections, vol. 2, page 45.

Attest: JOHN J. SOMES, *City Clerk.*

From city clerk's office.

114 IN BOARD OF ALDERMEN, *Sept.* 5, 1895.

Ordered—that his honor, the mayor notify the Gloucester Water Supply Company by communicating to it a copy of this order—that the City of Gloucester does not admit the correctness of the description of the property of the company dated and filed with the city clerk, August 15th, 1895, as a description of the property, which the company is authorized to sell and the city to purchase under and according to the provisions of section sixteen of chapter 451 of the Acts of the Legislature of the Year 1895, and does not consent to be bound thereby, or otherwise affected by such description; and that the inhabitants of the city have the right to vote and will be called upon to vote under section 16 of said act, upon the purchase of the property of the company described in said section under and according to the terms and provisions of said act, and not otherwise.

(Signed) THOMAS J. CARROLL.

In board of aldermen, Sept. 5, 1895.
Adopted. Sent down for concurrence.
(Signed) JOHN J. SOMES, *Clerk.*

In common council, Sept. 5, 1895.
Adopted in concurrence.
(Signed) A. F. STICKNEY, *Clerk.*

Approved, Sept. 6, 1895.
(Signed) BENJ. F. COOK, *Mayor.*

A true copy:
Attest: JOHN J. SOMES, *City Clerk.*

From city clerk's office.

115 MAYOR'S OFFICE,
CITY HALL, GLOUCESTER, MASS., *September* 6, 1895.

To the Gloucester Water Supply Company:

In compliance with an order adopted by the city council of the city of Gloucester Sept. 5th, 1895, approved Sept. 6, 1895, a copy of which said order is hereto annexed and made a part hereof, the Gloucester Water Supply Company is hereby notified that the City of Gloucester does not admit the correctness of the description of the property of the company dated and filed with the city clerk August 15th, 1895, as a description of the property which the company is authorized to sell and the city to purchase under and according to the provisions of section sixteen, of chapter 451 of the Acts of the Legislature of the Year 1895, and does not consent to be bound thereby, or otherwise affected by such description; and that the inhabitants of the city have the right to vote and will be called upon to vote under section 16 of said act, upon the purchase of the property of the company described in said section under and according to the terms and provisions of said act and not otherwise.

Very respectfully yours,
(Signed) BENJ. F. COOK,
Mayor of the City of Gloucester.

116 IN BOARD OF ALDERMEN,
GLOUCESTER, MASS., *Sept.* 5, 1895.

Ordered: That his honor the mayor notify the Gloucester Water Supply Company by communicating to it a copy of this order, that the City of Gloucester does not admit the correctness of the description of the property of the company dated and filed with the city clerk August 15th, 1895, as a description of the property which the company is authorized to sell and the city to purchase under and according to the provisions of section sixteen of chapter 451 of the Acts of the Legislature of the Year 1895, and does not consent to be bound thereby or otherwise affected by such description; and that the inhabitants of the city have the right to vote and will be called upon to vote under section 16 of said act, upon the purchase of the property of the company described in said section under and according to the terms and provisions of said act and not otherwise.

In board of aldermen, Sept. 5, 1895.
Adopted: Sent down for concurrence.
(Signed) JOHN J. SOMES, *Clerk.*

In common council, Sept. 5, 1895.
Adopted in concurrence.
(Signed) A. F. STICKNEY, *Clerk.*

Approved Sept. 6, 1895.
(Signed) BENJ. F. COOK, *Mayor.*

A true copy of the order as adopted by the city council Sept. 5, 1895.
Attest:
(Signed) JOHN J. SOMES, *City Clerk.*

117 ESSEX, *ss:*

GLOUCESTER, *September 7th*, 1895.

I this day served the within notice and order upon the within named Gloucester Water Supply Company by giving in hand to David W. Low, clerk of said Gloucester Water Supply Company, an attested copy of said notice and of the copy of the order to the same annexed, and by giving a like attested copy of said notice and of the copy of the order to the same annexed to Joseph O. Proctor, president of said Gloucester Water Supply Company.
(Signed) WILLIAM CRONIN,
Deputy Sheriff.

A true copy:
Attest: JOHN J. SOMES, *City Clerk.*

From city clerk's office.

118 On the first day of October, A. D. 1902, the following final decree is entered:

Final Decree.

Oct. 1, 1902.

COLT, *J.:*

This cause came on to be further heard at this term, and was argued by counsel, and thereupon, on consideration thereof, it is ordered, adjudged and decreed that the plaintiff's bill be dismissed, with costs to the defendant to be taxed by the clerk.
By the court:

BENJ. H. BRADLEE,
Deputy Clerk.

From the final decree the complainant claims an appeal to the Supreme Court of the United States and gives good and sufficient security that it will prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, and said appeal is allowed.
A true record.
Attest: ALEX. H. TROWBRIDGE, *Clerk.*

The following are the opinions of the circuit court filed in the case No. 924, equity, Newburyport Water Company *v.* City of Newburyport, by which case the court held in the rescript filed herein June 23, 1902, that the present case is governed:

119 Circuit Court of the United States, District of Massachusetts.
In Equity.

NEWBURYPORT WATER COMPANY
v.
CITY OF NEWBURYPORT. } No. 924.

Opinion of the Court, February 24, 1898.

COLT, *J.*:

The present hearing was had on demurrer to the bill of complaint. The principal question raised by the bill is whether the Massachusetts act of 1894 (chapter 474), as construed by the State court, is in violation of the fourteenth amendment of the Constitution of the United States.

That act, as interpreted by the State court, allowed the complainant no compensation for the value of its franchises or on account of its future earning capacity or good-will.

The demurrer assumes the truth of the allegations contained in the bill, which are properly pleaded, and we will only refer to such as we deem material.

It appears from the bill that the water company was duly incorporated under the Massachusetts Statutes of 1880, chapter 235, for the purpose of furnishing the city of Newburyport with water, and that it conducted its business until January 29, 1895.

Section 11 of its charter provided that the city should have the right at any time after ten years from the date of the completion of the water works to purchase the property, and all the rights and privileges of the company, at such price as might be mutu-
120 ally agreed upon, and, in case the water company and the city were unable to agree, the compensation was to be determined by three commissioners to be appointed by the State court. The city did not avail itself of the right to purchase under this act.

In 1893 the legislature passed an act which authorized the city of Newburyport to supply itself with water. Stat. 1893, chapter 471.

By section 12 of that act it was provided that at any time within sixty days after the passage of the act the water company might notify the mayor of Newburyport in writing that it desired to sell to the city its corporate property, and all the rights and privileges of the company, and to execute and deliver to the city proper deeds and instruments in writing, conveying to said city the property aforesaid: "Provided, however, the legal voters of the city of Newburyport, at legal meetings to be called in the several wards of said city

within six months after said notification has been received as aforesaid, shall, by a majority vote of the voters of said city present and voting thereon at said meetings, vote to purchase the aforesaid property upon the terms and conditions contained in this section, whereupon the property thus conveyed shall become the property of the City of Newburyport, and said city shall be liable to pay to said company the fair value of the property thus conveyed." Section 13 provided that "after the vote provided for in section 12 of this act, or provided the Newburyport Water Company does not so notify the said mayor within the sixty days, this act shall be submitted to the legal voters of the city of Newburyport for their acceptance or rejection, at legal meetings to be called in the several wards of said city within eight months from the passage of this act, and shall take effect from and after its acceptance by a two-thirds vote of the voters of said city present and voting thereon at said meetings."

Within sixty days after the passage of this act the water company notified the city of its desire to sell under the provisions of the act. On August 25, 1893, the city by a majority vote declined to purchase the property; but on September 7, 1893, voted the acceptance of chapter 471 of the act of 1893, authorizing it to build new water works.

121 The act of 1894 (Stat. 1894, chap. 474) provided that within thirty days after the passage of the act the water company should notify the mayor of the city of Newburyport in writing, that it desired to sell to the city "all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water, said city shall not proceed to supply water to itself or its inhabitants under the authority of chapter 471 of the Acts of the Year 1893, unless it shall have first purchased of said company the property aforesaid, and said company is authorized to make sale of said property to said city, and said city is authorized to purchase the same." The act further provides for a meeting of the legal voters to vote upon the question of purchase, and that if the city shall vote to purchase, the water company shall execute and deliver to the city proper deeds and instruments in writing "conveying to said city the property aforesaid, and said property thus conveyed shall thereupon become the property of said city, and said city shall pay to said company the fair value thereof, to be ascertained as hereinafter provided." And further, that in case the city and water company should be unable to agree upon the value of said property, the supreme judicial court shall appoint three commissioners to determine the fair value of said property for the purposes of its use by said city, and whose award when accepted by the court shall be final. "Such value shall be estimated without enhancement on account of future earning capacity or good will, or on account of the franchise of said company."

Within thirty days after the passage of this statute, a meeting of

the stockholders of the water company was held, and a vote was adopted, to the effect that the company desired to sell to the city the property described in the statute, and notice of said vote was on the same day sent to the city, and on January 15, 1895, a majority of the legal voters of said city voted to purchase the property of the water company, and on January 29, 1895, the water company conveyed its corporeal property to the city, and in paragraph 26 of its deed it purported to convey "all the rights, privileges and easements heretofore acquired under chapter 235 of the Acts of the Legislature of Massachusetts for the Year 1880, and now used by said com-
122 pany, of laying and maintaining water pipes and mains in said streets, and of making connections therewith for the purpose of supplying said city and the inhabitants thereof with water, and all property, property rights, corporate property, privileges, easements, waters and water rights of said company, whether herein particularly described or not, and all the rights and franchises of said company, whether for supplying water to the city of Newburyport and the inhabitants thereof, and of collecting water rates therefor, or otherwise, hereby conveying to said city all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water."

On January 31, 1895, the city took possession of the property of the water company, and as the water company and the city were unable to agree upon the price to be paid for the property, the water company on February 7, 1895, petitioned the court for the appointment of commissioners under the act of 1894. The commissioners were duly appointed and their report made February 3, 1897, showed that in their view the statute of 1894 excluded from their consideration any valuation of the franchise right of the company, or of its future earning capacity or good will.

The questions of law were reserved and argued before the full court, and on June 14, 1897, the court rendered an opinion holding that the decision of the commissioners was correct, and that under the act of 1894 the city was not required to pay the water company anything for its franchises, future earning capacity or good-will.

Subsequently the water company petitioned for a rehearing in the State court.

The bill alleges that the value of the rights of the water company which were excluded by the commissioners amounted to $475,000, and that the State court held they were properly so excluded under the act of 1894.

The bill further avers that after the passage of the act of 1893, permitting the city to build competing water works, the water company petitioned the legislature that the City of Newburyport should, before supplying its inhabitants with water, purchase "the
123 franchise, corporate property and all the rights and privileges of said Newburyport Water Company." As a result of this petition the legislature passed the act of 1894.

The bill further avers that the action of the water commissioners under the act of 1894 resulted in the deed of January 29, 1895, and that such conveyance by the water company "was voluntary in name and form only, and was in fact compulsory; and that said offer of sale and deed were made by said company to said City of Newburyport 'under the threat of municipal competition' by said city, and to avoid the ruin which would have resulted from such competition by said city; and that the said acts by which said city came into and obtained possession of the property described in said deed constituted a taking of such property in violation of the rights secured to plaintiff by the Constitution of the United States."

The bill (among other things) prays that chapter 474 of the act of 1894 may be decreed to be unconstitutional, and the deed cancelled and the property received thereunder restored to the complainant, or if the defendant is permitted to retain the property upon paying to the complainant just compensation for the entire property, the amount of compensation may be ascertained and the defendant be ordered to pay to the complainant the amount thereof.

The defendant demurs to the bill for want of jurisdiction, want of equity and on other grounds.

It is contended that on the face of the bill this is an attempt to review and retry here a case between the same parties already tried and determined in the State court.

The answer to this is that the constitutional questions set out in this bill were not raised in the State court and could not have been drawn in question in that suit.

Moore v. Sanford, 151 Mass., 285.
Pitkin v. Springfield, 112 Mass., 509.

In *Moore v. Sanford*, the plaintiffs, in 1885, filed a petition under the statute for damages sustained by the taking of their lands, and in 1889 brought a bill in equity to test the constitutionality of the statute, and to set aside the taking as unconstitutional. In holding
124 that the plaintiffs had a right, by an independent proceeding, to dispute the validity of the taking and the constitutionality of the act, the court said:

"The plaintiffs were entitled to have the question of the constitutionality of the statute determined, and under their petition for damages they were, by necessary inference, compelled in that proceeding to admit that it was constitutional."

If the question of the constitutionality of the act of 1894 was not open to the complainant in the proceeding in the State court, the objection that the complainant should have raised the question in that suit falls to the ground, and constitutes no defence to the present bill.

Nor do we think that the complainant is chargeable with such laches as to bar its right to bring this bill.

The bill was brought before the suit in the State court was finally determined, and before the acceptance by the complainant of the award.

Moore v. Sanford, ubi supra.

The fundamental question raised by the demurrer is whether the bill sets out a cause of equitable relief, or a "taking" of the complainant's property without "due process of law" or just compensation, in violation of the fourteenth amendment of the Constitution of the United States.

The bill alleges that the deed of the water company to the city under the act of 1894 was voluntary in name and form only, and was in fact compulsory, and was made under threat of competition by the city and to avoid the ruin which would have resulted from such competition, and that this constituted a "taking" in violation of a constitutional right.

We must assume, for the purpose of this demurrer, that the complainant took advantage of the act of 1894, under a threat of competition by the city which would have been ruinous to its property, and that its subsequent acts and conduct resulted from such threat. It further appears that under the construction given to the act of 1894 by the State court no compensation was allowed the complainant for its franchise rights, future earning capacity, or goodwill.

In *Swift Co v. United States*, 111 U. S., 22, a payment made to a public officer in discharge of a fee or tax illegally exacted is
125 not such a voluntary payment as will preclude the party from recovering it back. The court said:

"The question is, whether the receipts, agreements, accounts and settlements made in pursuance of that demand and necessity were voluntary in such sense as to preclude the appellant from subsequently insisting on its statutory right.

We cannot hesitate to answer that question in the negative. The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction, or discontinue its business. It was in the power of the officers of the law, and could only do as they required. Money paid or other value parted with, under such pressure, has never been regarded as a voluntary act within the meaning of the maxim, *volenti non fit injuria*."

In *Robertson v. Frank Bros. Co.*, 132 U. S. 17, it was held that the payment of money to a customs official, to avoid an onerous penalty, though the imposition of that penalty may have been illegal, is sufficient to make the payment an involuntary one.

The court, speaking through Mr. Justice Bradley, said:

"It was contended by the counsel for the Government at the trial, and is contended here, that the payment of the duties complained of was a voluntary payment, inasmuch as the plaintiffs themselves made the additions to the entries and invoices, and that, therefore, they cannot recover back any part of the money so paid; and they requested the court below to instruct the jury to render a verdict for the defendant. This the court refused to do; and left it to the jury to decide, upon the evidence, whether the making of the additions was a voluntary act on the part of the plaintiffs, or done under constraint in view of the penalty sure to be imposed in case it was not done."

In *Chicago, Burlington & Quincy Railroad Company v. Chicago*, 166 U. S. 226, it was held that a judgment of a State court, even if authorized by statute, whereby private property is taken for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the Constitution of the United States; and that the defendant has been deprived of property without due process of law is not entirely met by the suggestion that he had due notice of the proceedings for condemnation, appeared, and was admitted to make defence.

Demurrer overruled.

126 Circuit Court of the United States, District of Massachusetts.
In Equity.

NEWBURYPORT WATER COMPANY
v.
CITY OF NEWBURYPORT. } No. 924.

Before Colt and Brown, JJ.

Opinion of the Court, August 8, 1900.

COLT, *J.:*

Under the stipulation of counsel and order of court, the single question now presented is whether the plaintiff has been deprived of its property without due process of law in violation of the fourteenth amendment to the Constitution of the United States; all other questions as to the plaintiff's relief under its bill, including the question of valuation of the property alleged to have been taken, are to await the determination of the constitutional question.

The plaintiff, The Newburyport Water Company, was chartered by the State of Massachusetts in 1880, to supply the city of Newburyport and its inhabitants with water (Mass. St. of 1880, ch. 235). The company thereupon constructed a system of water works and proceeded to supply the city and its inhabitants with water. In 1893 the city petitioned the legislature for authority to build its own waterworks.

Notwithstanding the opposition of the company, the legislature passed the act of June 10, 1893, (Mass. St. of 1893, ch. 471)
127 authorizing the city to establish waterworks. After the vote by the city upon the acceptance of the act, the counsel for the city claimed and advised that the city had the right to supply itself and its inhabitants with water.

Thereupon, the company applied to the legislature to have the city required to purchase its waterworks before it proceeded to supply itself and its inhabitants with water. The application resulted in the passage of the act of June 14, 1894 (Mass. St. of 1894, ch. 474).

This act provided that the city should not proceed to build water works under the act of 1893 unless it should first purchase the company's property which it might do by a majority vote; and that, the city having so voted, the company should within twenty days execute and deliver to the city proper deeds conveying its property; that the property conveyed should thereupon become the property of the city, and that the city should pay to the company the fair value thereof, which if not agreed upon, should be determined by three commissioners appointed by the supreme judicial court, who should determine the fair value of the property "for the purposes of its use by said city," and "without enhancement on account of future earning capacity or good will, or on account of the franchise of said company."

The city voted to purchase; and, on January 29, 1895, the company executed and delivered to the city a duly authorized deed of all its property and franchise rights. The city took possession of the property and has ever since managed and operated it.

After the conveyance, commissioners were appointed, and on February 3, 1897, they filed in the State court their award. Questions of law arising on the award were reserved by a single justice for the full court, and on June 14, 1897, that court made an order sustaining the action of the commissioners. The commissioners estimated the value of the company's property for the purposes of its use by the city, and excluded from such valuation its future earning capacity, good will, and its right to the use of the streets and to collect water rates.

In order to sustain the contention that the plaintiff has been deprived of its property without due process of law in violation of the fourteenth amendment to the Constitution of the United States, it is necessary to show, as the plaintiff declares in its brief:

1. That the plaintiff's property was taken for public uses.

128 2. That the property was taken under color of the authority of a State.

3. That the taking was without just compensation.

The plaintiff bases the taking of its property upon the legislative threat to authorize municipal competition, whereby its deed to the city became voluntary only in form while in fact it was compulsory. This threatened competition, it is claimed, forced the plaintiff, against its will, to convey its property to the city for an insufficient consideration, and made the deed in effect a *taking* of property without just compensation under color of legislative authority.

The proposition here advanced requires a somewhat extended examination of the acts of 1893 and 1894 and their general bearing upon the single issue before us.

At the outset, it may be observed, that if the plaintiff establish a *taking* of its property, under the acts of 1893 and 1894, it is clearly right in its contention that such taking was without just compensation. The act of 1894 provided that the valuation of the property should be "the fair value of said property for the purposes of its use by said city," and "such value shall be estimated without enhance-

ment on account of future earning capacity or good will, or on account of the franchise of said company." A *taking* under an act providing such a method of compensation would be unconstitutional because without just compensation. It would be a taking "without due process of law" in violation of the fourteenth amendment.

Where private property is taken for public uses, the legislature cannot fix the compensation, or determine in what it shall consist, or prescribe the rules and principles upon which it shall be computed. Lewis on Eminent Domain, sec. 461. When a taking has been ordered, the question of compensation is judicial, not legislative. The legislature cannot extinguish any part of such compensation, or in any manner "interfere with the just powers and province of courts and juries to administer rights and justice."

It is sufficient on this point to cite the language of the Supreme Court in two cases. In *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 327, the court said:

"By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—
129 that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry. In *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 571, Mr. Justice McLean in his opinion, referring to a provision for compensation found in the charter of the Warren bridge, uses this language: 'They (the legislature) provide that the new company shall pay annually to the college, in behalf of the old one, one hundred pounds. By this provision, it appears that the legislature has undertaken to do what a jury of the country only could constitutionally do: assess the amount of compensation to which the complainants are entitled.' See also the following authorities: *Commonwealth v. Pittsburgh & Connellsville Railroad*, 58 Penn. St. 26, 50; *Penn. Railroad v. Balt. & Ohio Railroad*, 60 Maryland, 263; *Isom v. Mississippi Central Railroad*, 36 Mississippi, 300. In the last of these cases, and on page 315, will be found these observations of the court: 'The right of the legislature of the State, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case, to determine what is the 'just compensation' it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent, or to extinguish any part of such 'compensation' by prospective conjectural advantage, or *in any manner* to interfere with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our

Constitution. If anything *can be* clear and undeniable, upon principles of natural justice or constitutional law, it seems that this must be so.' We are not, therefore, concluded by the declaration in the act that the franchise to collect tolls is not to be considered in estimating the sum to be paid for the property."

In *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 409, 410, the court observed:

"If the State were to seek to acquire the title to these roads, under its power of eminent domain, is there any doubt that constitutional provisions would require the payment to the corporation of just compensation, that compensation being the value of the property as it stood in the markets of the world, and not as prescribed by an act of the legislature?"

We have to ascertain then, in order to dispose of the question before us, whether there was a *taking* of the plaintiff's property (the term "property," including franchise rights) by or under the acts of 1893 and 1894.

The *taking* complained of in this case was by right of
130 eminent domain, and not under the guise of taxation or police regulation. Eminent domain "embraces all cases where, by authority of the State and for the public good, the property of the individual is taken, without his consent, for the purpose of being devoted to some particular use." Lewis on Eminent Domain, sec. 1.

Where the State grants a franchise to a corporation, and subsequently grants a similar franchise to another corporation, the question of a *taking* may be considered from three points of view. Where the first grant is not exclusive, the subsequent grant is not a taking which entitles the owner of the first franchise to compensation. Where the first grant is exclusive, the grant of a rival franchise is a taking, and just compensation must be made. Where the first grant is exclusive, the grant of a similar franchise does not constitute a taking requiring compensation, when the State, by its constitution or statute law, has reserved to itself the power to repeal, alter, or amend charters granted by the legislature. Such reservation becomes a part of the charter of every corporation. Shortly stated, the grant by the State of a competing franchise does not constitute a taking of a former non-exclusive franchise, while in the case of an exclusive franchise it does constitute a taking in the absence of a reserve power in the State. *Charles River Bridge v. Warren Bridge*, 7 Pick. 344; affirmed, 11 Pet. 420; *Hamilton Gas Company v. Hamilton*, 37 Fed. Rep. 832; affirmed, 146 U. S. 258; *Greenwood v. Freight Company*, 105 U. S. 13; *Binghampton Bridge*, 3 Wall. 51; *Tomlinson v. Jessup*, 15 Wall. 454; *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *Sioux City Street R'y Co. v. Sioux City*, 138 U. S. 98; *Louisville Water Company v. Clark*, 143 U. S. 1; *Schurz v. Cook*, 148 U. S. 397, 410; *New York and New England R. R. v. Bristol*, 151 U. S. 556, 567; *Covington v. Kentucky*, 173 U. S. 231; *Metropolitan R. R. Co. v. Highland Railway*, 118 Mass. 290, 293; *Thornton v. Marginal Freight Railway*, 123 Mass. 32; *Piscataqua Bridge v. New Hampshire Bridge*,

7 N. H. 35; *Boston and Lowell R. R. v. Salem and Lowell R. R. Co.*, 2 Gray, 1; *Power v. Village of Athens*, 99 N. Y. 592.

The act of 1893 authorized the city to supply itself and its inhabitants with water, provided, if the company so desired, the city should first vote upon the proposition to purchase the company's works. The city voted not to purchase, and did vote to ac-
131 cept the provisions of the act. The franchise rights granted to the company by its charter were not exclusive. This is not disputed. We have then presented the question, whether the subsequent grant to the city of the right to build competing waterworks constituted a *taking* of the plaintiff's property or franchise. It is the settled law of this country, established by the decisions of the Federal and State courts, that such a grant is not a *taking* of a former franchise giving any right to compensation. "Where the grant is not by its terms exclusive, the legislature is not precluded from granting a similar franchise or erecting a rival way or structure, the result of which may be to greatly impair or even totally destroy the value of the former grant, and such damage is not a *taking* of the former franchise which entitles its owner to compensation. This principle was settled in the leading case of *Charles River Bridge v. Warren Bridge*, and has been confirmed by numerous decisions." Lewis on Eminent Domain, sec. 136.

In the case of *Charles River Bridge v. Warren Bridge*, 7 Pick. 344, the supreme court of Massachusetts held that the grant by the legislature of a competing franchise did not divest vested rights or impair the obligation of a contract.

On appeal (11 Pet. 420), the Supreme Court of the United States placed its decision on the latter ground. This was before the passage of the fourteenth amendment, so that the only Federal constitutional right involved related to contract.

In *Hamilton Gas Light Co. v. City of Hamilton*, 37 Fed. Rep. 832, 836, where a municipality was proceeding to construct competing gas works under a State statute, the point was taken that the statute interfered with vested rights, and impaired, if it did not destroy, the property of the company, and was in effect an appropriation of private property to public use without making compensation, in violation of the fourteenth amendment to the Constitution of the United States. The court decided against this contention.

In the Supreme Court, on appeal (146 U. S. 258), as appears from the statement of the case by the court on page 259, the plaintiff invoked the protection of the contract clause of the Constitution, as well as the clause that no State shall deprive any person of property without due process of law. The court, in its opinion, affirming the judgment below, only discusses the question whether there was any impairment of the obligation of a contract, and by im-
132 plication, at least (for the point was necessarily involved in the decision), held that the claim that the plaintiff was deprived of its property without due process of law was so untenable as a legal proposition as not to require discussion.

It may be said that since the decision in *Charles River Bridge v.*

Warren Bridge, the Supreme Court and other courts in this country have recognized the law as settled, that where the State grants a franchise, which is not by express terms made exclusive, the subsequent grant of a similar and competing franchise impairs no constitutional right; that it is neither a violation of the obligation of a contract, nor an impairment of vested rights, nor a taking of property without just compensation.

In *Fort Plain Bridge Company v. Smith*, 30 N. Y. 44, 61, the court observed:

"Since the case of *The Charles River Bridge v. The Warren Bridge* (11 Peters 420), it has been understood to be the law that it is competent for the legislature, after granting a franchise to one person or corporation, which affects the rights of the public, to grant a similar franchise to another person or corporation, the use of which shall impair or even destroy the value of the first franchise, although the right so to do may not be reserved in the first grant; unless the right so to do is expressly prohibited by the first grant."

In The *Salem and Hamburgh Turnpike Company v. Lyme*, 18 Conn. 451, 457, the court said:

"Since the decision of this court in the case of *The Enfield Toll Bridge Company v. The Hartford and New Haven Railroad Company*, 17 Conn. R. 454, and of the Supreme Court of the United States in the case of *The Charles River Bridge v. The Warren Bridge*, 11 Peters, 420, and the numerous decisions to the same effect, cited in those cases, we do not think it an open question, whether a new road, canal, or bridge, materially diverting travel or business from an old one under a prior charter, is therefore unconstitutional, or to be suppressed."

In The *Lafayette Plankroad Company v. The New Albany & Salem Railroad Company*, 13 Ind. 90, 92, the court declared:

"The grant of a charter for a road, a bridge, or a ferry, does not estop the legislature from granting a subsequent charter for a road, bridge, or ferry, which may compete with the former in the transportation of freight and passengers between given points; and the simple fact that the two run parallel, and mutually diminish the business of each other, is no ground for a claim by either for damages."

133 Although the Supreme Court, in those cases where the exercise of this power by or under the State has been disputed, has usually confined the discussion of the alleged violation of constitutional rights to the contract clause, the language of the court in those cases is instructive, and has an important bearing on the specific question under consideration. In *Lehigh Water Company v. Easton*, 121 U. S. 388, 390, the court said:

"By constructing waterworks of its own, the borough will not destroy the franchises of the plaintiff company. It may impair their value, and probably will do so; but of this the company have no legal cause of complaint. The granting of a new charter to a new corporation may sometimes render valueless the franchises of an existing corporation; but unless the State by contract has precluded

itself from such new grant the incidental injury can constitute no obstacle."

In *Stein v. Bienville Water Co.*, 141 U. S. 67, 81, the court said:

"Guided by this rule, in respect to which there is no difference of opinion in the courts of this country, we are forbidden to hold that a grant under legislative authority, of an exclusive privilege, for a term of years, of supplying a municipal corporation and its people with water drawn by means of a system of water works from a particular stream or river, prevents the State from granting to other persons the privilege of supplying, during the same period, the same corporation and people with water drawn in like manner from a different stream or river."

In *Hamilton Gas Co. v. Hamilton*, 146 U. S. 258, the company maintained that its charter was exclusive. The city was proceeding to build works of its own, claiming statutory authority therefor. As we have already observed, the company in that case contended that this was an impairment of its charter, and a taking of its property without due process of law.

The court observed at page 268:

"It may be that the erection and maintenance of gas-works by the city at the public expense, and in competition with the plaintiff, will ultimately impair, if not destroy, the value of the plaintiff's works for the purposes for which they were established. But such considerations cannot control the determination of the legal rights of the parties."

In *Pearsall v. Great Northern Railway*, 161 U. S. 646, 664, the court said:

"An exclusive right to enjoy a certain franchise is never presumed, and unless the charter contain words of exclusion, it is no im-
134 pairment of the grant to permit another to do the same thing, although the value of the franchise to the first grantee may be wholly destroyed. This principle was laid down at an early day in the case of the *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, and has been steadily adhered to ever since."

Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, was an appeal from the New York court of appeals. The court (p. 696) said:

"The court of appeals held that neither the statute under which the company was organized, nor the contract, nor the act of annexation, gave to the company rights exclusive and beyond the reach of legislative action. These conclusions of the court of appeals are vigorously challenged in the argument, but we are of opinion that they are correct. The statute simply provided for the organization of water companies. The contract in terms contained no words of exclusion. It gave to the company the privilege of laying its mains in the streets of the town, and contained a covenant on the part of the town to pay certain hydrant rentals. But grants from the public are strictly construed in favor of the public, and grants of a privilege are not ordinarily to be taken as grants of an exclusive privilege."

As the franchise granted to the plaintiff by its charter was not

exclusive, the subsequent grant by the act of 1893 giving the city authority to construct independent and competing waterworks, was not a violation of the plaintiff's charter, or of any constitutional right.

In establishing the power of the legislature to grant a competing franchise, the conflict has been between the rightful claims of the public and the protection secured to private property by constitutional provisions. Before the case of *Charles River Bridge v. Warren Bridge* (1837), many eminent judges and lawyers were of the opinion that such legislation impaired vested rights of property and violated the contract between the State and the corporation secured by charter. In that case, however, it was successfully urged, though the court were divided in opinion, that the grant by the sovereign authority of a franchise to build a bridge over a public water-way, and to collect tolls, did not prohibit the grant of another franchise to construct a bridge over the same water-way which was free to the public, though the effect was to impair, or even destroy, the value of the first grant. Whatever doubt may have formerly existed as to this power of the legislature, and however cogent and just the argument may be against its exercise in a particular case, the right of the legislature to exercise it in any case cannot now be
135 questioned; and when a franchise is now obtained for the purpose of establishing waterworks, or to promote like enterprises in which the public are interested, and capital is invested, it should not be upon the assumption or belief that the town or city will refrain from competition and the legislature will refuse to authorize it. On the contrary, this legislative power having been upheld and enforced for so many years it may well be presumed that when a franchise is obtained which is not exclusive, it is taken with the knowledge and risk that the legislature is not precluded from granting, at any moment, a similar and competing franchise.

Before examining the act of 1894, it may be well to call attention to some preliminary considerations. The plaintiff contends that the *taking* in this case was wholly under the act of 1894, and that the act of 1893 never took effect, because the "vote to purchase" the company's works, under section 12 of the act, was a condition precedent to the city's right to vote to supply itself and its inhabitants with water under section 13; and the city having voted not to purchase, the act failed, and, consequently, the subsequent vote by the city to accept the provisions of the act was nugatory. This construction seems contrary to the intent and purpose of the act. The natural and reasonable construction of sections 12 and 13, looking at the whole act, is that the city should first decide whether it would purchase the plaintiff's works before determining whether it would build works of its own. For the purpose of our present inquiry, however, it is unnecessary to pass upon this question. If the act of 1893 were in force, as contended by the defendant, there was, as we have seen, no *taking* of the plaintiff's property under it. If it were not in force, there surely was no such taking. But whether legally in force or not, it clearly appears that it was the fear or belief of the

company, the city, and the legislature, that the act of 1893 was operative which led to the passage of the act of 1894.

After the vote by the city accepting the act of 1893, the company petitioned the legislature that the city should buy its property and franchise before proceeding to build waterworks under the act. Accompanying this petition was a proposed bill, which provided that the city should, "before proceeding to supply itself and its inhabitants with water under the authority of chapter four hundred and seventy-one of the Acts of the Year One thousand eight hundred and ninety-three, purchase from the Newburyport Water
136 Company the franchise, corporate property, and all the rights and privileges of said Newburyport Water Company." It further provided that the compensation to be paid by the city should be determined by three commissioners appointed by the supreme judicial court.

Thereupon, the legislature passed the act of 1894, obliging the city to purchase the plaintiff's works before proceeding to supply itself and its inhabitants with water under the act of 1893, and at the same time fixing the measure of compensation to be paid by the city.

Section 1 declares:

"If, within thirty days after the passage of this act, the Newburyport Water Company shall notify the mayor of the city of Newburyport in writing that it desires to sell to said city all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water, said city shall not proceed to supply water to itself or its inhabitants, under the authority of chapter four hundred and seventy one of the Acts of the Year Eighteen hundred and ninety-three, unless it shall have first purchased of said company the property aforesaid; and said company is authorized to make sale of said property to said city, and said city is authorized to purchase the same."

The act then provides that whenever the city shall vote to purchase said property, "notice of the desire of said company to sell the same having been given as hereinbefore provided," the company shall within twenty days convey by deed its property to the city, and the city shall pay "the fair value thereof to be ascertained as hereinafter provided." If the parties are unable to agree upon the value of the property, commissioners are to be appointed "who shall determine the fair value of said property for the purposes of its use by said city, and whose award, when accepted by the court, shall be final. Such value shall be estimated without enhancement on account of future earning capacity or good will, or on account of the franchise of said company." Section 4 of the act declares:

"In case said city shall, in violation of section one of this act, proceed to supply itself or its inhabitants with water before making the purchase aforesaid, the supreme judicial court shall, upon peti-

tion of said company, have jurisdiction in equity to enjoin said city from so doing until it shall have made such purchase."

Before the consideration of what the plaintiff claims was the legal effect of this act let us refer for a moment to its manifest
137 purpose. Recognizing the act of 1893 as in force, it simply prohibits the city from exercising the right to build waterworks under that act if the plaintiff desires to sell its works to the city upon the terms provided. There is certainly nothing on the face of the act which authorizes the taking of the plaintiff's property without its consent. It does not in terms compel the company to sell its property to the city. On the contrary, it expressly declares that the company may do so if it "desires."

If the act provide for a voluntary conveyance, the insufficiency of the consideration prescribed has no bearing on the issue before us. The question of compensation becomes material only in the event that the sale under the act was made without the plaintiff's consent. If this does not appear, there is no violation of the constitutional right now invoked, whatever other relief the plaintiff may be entitled to.

The great injury which at this time threatened the company's property was municipal competition under the act of 1893, and the act of 1894 was passed as a protection against such impending disaster. The legislature might have provided in that act, and there is much force in the contention that in justice and equity it ought to have provided, that the plaintiff should receive full compensation for its property purchased by the city, but the failure of the legislature to make such provision cannot change the nature and scope of a statute which authorized a voluntary sale into a statute which authorized the taking of the plaintiff's property without its consent by right of eminent domain.

We will now consider more directly and specifically the general argument advanced by the plaintiff to establish a *taking* of its property without just compensation. This argument may be summarized as follows:

The act of 1893 never took effect and was void except so far as it was re-enacted in the act of 1894; the act of 1894 was in effect a threat by the State that it would authorize the city to build competing waterworks and so ruin the company, unless it consented to convey its property to the city without just compensation; that in consequence of such threat the company conveyed its property to the city; that by reason of such threat the deed of conveyance though voluntary in form was in fact compulsory; that
138 such compulsion constituted duress and made the conveyance a *taking;* that such taking was plainly without just compensation by the terms of the act. Stated in another form the proposition is that a threatened lawful grant by the State to *B* of a franchise similar to one already granted to *A* is an exercise of unlawful compulsion on the part of the sovereign authority, and that a voluntary conveyance of property under a statute containing such a threat, and not providing for full compensation, is voluntary only

in form, while in fact it is made under duress; that, consequently, such a statu-e in effect authorized a *taking* of property without just compensation in violation of a constitutional right.

The plaintiff's contention is founded upon the hypothesis that the right of the city to build competing waterworks under the act of 1893 did not exist when the act of 1894 was passed. If, however, the act of 1893 was in force at that time, as we are inclined to hold, then the State threatened nothing by the act of 1894 because it had already authorized municipal competition. In that case we are confronted with this question, whether, the city having the right to compete, it was lawful for the legislature to pass the act of 1894 forbidding the city so to do, providing the company chose to sell on terms which did not award full compensation for its property. But it can hardly be seriously urged that when the company was met by legal competition which meant ruin, it was unlawful for the legislature to pass an act which at least made the situation less disastrous, and providing at the same time that the company need not avail itself of the act unless it saw fit.

Nor is the situation any different in principle if we assume that the act of 1893 was void, and that we have only to consider the act of 1894. The only difference is that in one case the legislature had authorized legal competition, and in the other, as it is claimed, it threatened to authorize legal competition. But if competition be lawful, threatened competition is lawful. And if it were lawful for the State to authorize municipal competition, it was not unlawful for it to threaten to authorize municipal competition.

But it is urged, and this is the crucial point in the plaintiff's argument, that the threat of competition produced compulsion which amounted to duress, and, consequently, made the sale by the company to the city not a voluntary but a compulsory act, and being compulsory its effect was a *taking* of the plaintiff's property
139 without just compensation. The plaintiff's whole position hinges on the question of compulsion.

In approaching this question it may be observed that there was a greater degree of compulsion on the part of the State if we assume the act of 1893 was operative than if we assume it was void. In the former case municipal competition had actually been authorized, while in the latter case it was only threatened.

But what was the compulsion in this case? It was the compulsion arising from the fear of competition produced by what is termed the threat of the State to authorize municipal competition. If a person apprehensive of competition sells his property for less than its fair value, it cannot be said that in law the sale was voluntary in form only, and in fact compulsory. In a certain sense, such a sale is compulsory. It is, however, a kind of compulsion which will always exist so long as competition exists. But this is not the kind of compulsion that amounts in law to duress because it lacks the essential ingredient of duress, namely, illegality. It is unlawful compulsion which constitutes duress. "Duress exists," says Judge Cooley, "when one, by the unlawful act of another, is induced to make a

contract or perform some act under circumstances which deprive him of the exercise of free will." *Hackley v. Headley*, 45 Mich. 569, 574. Duress by the Government or its officers, in this class of cases, is defined by the Supreme Court as "moral duress not justified by law." *Maxwell v. Griswold*, 10 How. 242, 256. It must be the pressure arising from unlawful acts or demands on the part of the Government or its officers to produce that constraint of will or action, or state of necessity or compulsion, which render acts voluntary in form, involuntary and void. In this class of cases the test is, was the cause of the compulsion lawful or unlawful. If the compulsion be founded on lawful competition, or the threat of lawful competition, there is no element of illegality about it. Such compulsion is justified by law.

The whole question of compulsion or duress in this case turns upon whether municipal competition, actual or threatened, under the authority of the State, was justified by law. If it were, as we have shown, then the deed to the city was not given under unlawful compulsion or duress, but was voluntary in fact and in law. On the other hand, it may be said, that if it had been unlawful for the State to authorize municipal competition, then the threat so to do might have been held to have amounted to duress not justified by law,
140 and, consequently, the deed of the plaintiff's property to have been in effect a *taking* without just compensation under the authority of the State.

In the Supreme Court cases relied on by the plaintiff it will be found that the compulsion or duress was based upon an illegal act or exaction, or threatened illegal act or exaction, by the Government or its officers.

United States v. Tingey, 5 Pet. 115, 129, was a suit brought by the Government upon a bond, variant from that prescribed by law, demanded of a public officer upon the peril of losing his office. Mr. Justice Story, delivering the opinion of the court, said:

"The substance of this plea is, that the bond, with the above condition, variant from that prescribed by law, was, under color of office, extorted from Deblois and his sureties, contrary to the statute, by the then Secretary of the Navy, as the condition of his remaining in the office of purser, and receiving its emoluments. There is no pretence then to say, that it was a bond voluntarily given, or that, though different from the form prescribed by the statute, it was received and executed without objection. It was demanded of the party, upon the peril of losing his office; it was extorted under color of office, against the requisitions of the statute. It was plainly, then, an illegal bond; for no officer of the Government has a right, by color of his office, to require from any subordinate officer, as a condition of holding office, that he should execute a bond with a condition different from that prescribed by law; that would be, not to execute, but to supersede, the requisitions of law; it would be very different, where such a bond was, by mistake or otherwise, voluntarily substituted by the parties for the statute bond, without any coercion or extortion by color of office."

Maxwell v. Griswold, 10 How. 242, was a case where an appraisement of imported goods was erroneously made as to the point of time of the valuation, and the importer paid the consequent excess of duties. The Government contended that this was voluntary. The court (p. 256) said:

"But this addition and consequent payment of the higher duties were so far from voluntary in him, that he accompanied them with remonstrances against being thus coerced to do the act in order to escape a greater evil, and accompanied the payment with a protest against the legality of the course pursued towards him.

Now, it can hardly be meant in this class of cases, that, to make a payment involuntary, it should be by actual violence, or any physical duress. It suffices, if the payment is caused on the one part by an illegal demand, and made on the other part reluctantly and in consequence of that illegality, and without being able to regain possession of his property except by submitting to the payment.

141 All these requisites existed here. We have already decided, that the demand for such an increased appraisal was illegal. The appraisal itself, as made, was illegal. The raising of the invoice was thus caused by these illegalities in order to escape a greater burden in the penalty. The payment of the increased duties thus caused was wrongfully imposed on the importer, and was submitted to merely as a choice of evils.

He was unwilling to pay either the excess of duties or the penalty, and must be considered, therefore, as forced into one or the other by the collector, *colore officii*, through the invalid and illegal course pursued in having the appraisal made of the value at the wrong period, however well meant may have been the views of the collector.

The money was thus obtained by a moral duress, not justified by law, and which was not submitted to by the importer, except to regain possession of his property withheld from him on grounds manifestly wrong."

In *Swift Company v. United States*, 111 U. S. 22, 28, the plaintiffs, who were manufacturers of matches and furnished their own dies for the stamps used by them, and were thereby entitled to a commission of ten per cent. in money on the price of the stamps, accepted for a long period their commissions in stamps because the Treasury Department would pay in no other manner. The court held that the apprehension of being stopped in their business by this illegal exaction was a sufficient moral duress to make their payments involuntary. Mr. Justice Matthews, delivering the opinion of the court, said:

"The question is, whether the receipts, agreements, accounts, and settlements made in pursuance of that demand and necessity, were voluntary in such sense as to preclude the appellant from subsequently insisting on its statutory right. We cannot hesitate to answer that question in the negative. The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction, or discontinue its business. It

was in the power of the officers of the law, and could only do as they required. Money paid or other value parted with, under such pressure, has never been regarded as a voluntary act within the meaning of the maxim, *volenti non fit injuria*."

In support of the position taken, the court (p. 29) referred to numerous cases:

"In *Close v. Phipps*, 7 M. & Gr. 586, which was a case of money paid in excess of what was due in order to prevent a threatened sale of mortgaged property, Tindal, C. J., said: 'The interest of the plaintiff to prevent the sale, by submitting to the demand, was so great, that it may well be said the payment was made under
142 what the law calls a species of duress.' And in *Parker v. Great Western Railway Company*, 7 M. & Gr. 253, the wholesome principle was recognized that payments made to a common carrier to induce it to do what by law, without them, it was bound to do, were not voluntary, and might be recovered back. Illegal interest, paid as a condition to redeem a pawn, was held in *Astley v. Reynolds*, 2 Stra. 915, to be a payment by compulsion. This case was followed, after a satisfactory review of the authorities, in *Tutt v. Ide*, 3 Blatchf. 249; and in *Ogden v. Maxwell*, 3 Blatchf. 319, it was held that illegal fees exacted by a collector, though sanctioned by a long continued usage and practice in the office, under a mistaken construction of the statute, even when paid without protest, might be recovered back, on the ground that the payment was compulsory and not voluntary."

The court then cites *Maxwell v. Griswold*, 10 How. 242, and other cases.

In *Robertson v. Frank Brothers Company*, 132 U. S. 17, a customs official proceeded in his appraisement upon a wrong principle contrary to law, and it was held that the compulsory insertion, under threat of an onerous penalty, by the importer of such additional charges upon the entry and invoice, which necessity involved the payment of increased duties, makes the payment of those duties involuntary.

In delivering the opinion of the court, Mr. Justice Bradley (p. 24) said:

"In our judgment the payment of money to an official, as in the present case, to avoid an onerous penalty, though the imposition of that penalty might have been illegal, was sufficient to make the payment an involuntary one. It is true that the thing done under compulsion in this case was the insertion of the additional charges upon the entries and invoices; but that necessarily involved the payment of the increased duties caused thereby, and in effect amounts to the same thing as an involuntary payment."

Mr. Justice Bradley in that opinion refers to the language of the decisions in *Maxwell v. Griswold*, and *Swift Company v. United States* which we have cited, and in speaking of the former case he declares that "the ultimate fact was the moral duress not justified by law."

In the above cases, which are cited by the plaintiff, it is seen that it is the element of illegality which lies at the foundation of this

species of duress. In those cases the moral duress was caused by the illegal acts or demands of the Government or its officers. In the case at bar there was no moral duress not justified by law, because it was lawful for the State to authorize, or threaten to author-
143 ize, municipal competition. There would have been a close analogy between those cases and the present, if the plaintiff had possessed an exclusive franchise, and the legislature had, contrary to law, authorized, or threatened to authorize, municipal competition. In that event it might have been claimed that the company was compelled to convey its property to the city under an unlawful exercise of legislative power, and, therefore, under moral duress not justified by law.

The plaintiff argues that the measure of compensation provided by the act of 1894 was not justified by law, and that, consequently, the principle recognized in the above cases is applicable to the present case. But this is an attempt to connect things that are entirely distinct. The compensation to be paid for the plaintiff's property has nothing to do with the subject of duress. It was not the want of just compensation, but the threat of municipal competition, which was the cause of the alleged duress. To connect the alleged duress with the lack of compensation involves the proposition that the compulsion which forced the plaintiff to deed its property to the city was owing to the unlawful compensation provided by the act of 1894, and not to the threatened competition by the city. The want of just compensation has no bearing on the question before us unless the plaintiff first establishes a duress not justified by law.

And this brings us to the decisive point on the issue under consideration, and the conclusion we have reached.

We hold, for the reasons already given, that the grant of a competing franchise to the city in this case was a lawful exercise of legislative power, and that the threatened grant of such a franchise under the act of 1894 (admitting this to be the effect of the act) was a lawful exercise of legislative power, and that, being lawful, it could not in either case have the legal effect of making a voluntary conveyance of the plaintiff's property, compulsory and void, and that, consequently, the plaintiff has failed to establish a *taking* of its property without just compensation under the authority of the State.

Upon the single question submitted for our determination, and without passing on any other question concerning the plaintiff's relief under the bill, we are of opinion, after careful consideration, that the plaintiff has not been deprived of its property without due process of law in violation of the fourteenth amendment to the Constitution of the United States, and a decree may be drawn accordingly.

144 Circuit Court of the United States, District of Massachusetts.
In Equity.

NEWBURYPORT WATER COMPANY
v.
CITY OF NEWBURYPORT. } No. 924.

Before Colt and Brown, JJ.

Opinion, March 5, 1902.

Per curiam (as amended): It has been decided by this court, upon full and careful consideration, that there was no taking of the complainant's property under the acts of 1893 and 1894; that the deed of the complainant's property was voluntary, and not compulsory; and that, consequently, the complainant had not been deprived of its property without due process of law, in violation of the fourteenth amendment to the Constitution of the United States. The complainant now maintains that the act of 1894 was in violation of section 10 of article 1 of the Constitution, which provides that "No State shall pass any law impairing the obligation of contracts." The complainant raises this question by asking the court to admit the testimony of the commissioners appointed to value the complainant's property under the act of 1894 to the effect that they did not in fact value the water contract entered into between the complainant and defendant.

145 The act of 1893 authorizes municipal competition, which the legislature had legal right to authorize. The act of 1894 forbids municipal competition, provided the complainant chose to deed its property to the defendant on the terms specified. This act did not impair any contract which had been entered into between the complainant and defendant. It simply gave the complainant the option if it chose, to sell its property to the defendant on the terms mentioned. The complainant, if it so desired, could have retained its property and its contract with the defendant; but it did not do so, and voluntarily deeded its property to the defendant. If it lost any right to any contract by this action, it was because it deemed it wise to take advantage of the provisions of the act of 1894, which obliged the defendant to buy the water works, if the complainant so desired, before it should undertake to build water works of its own.

Assuming that this testimony could properly be offered at this stage of the case (a question which we do not find it necessary to pass upon), and that the complainant could show that the commissioners did not in fact value the water contract in estimating the value of the complainant's property, we are of the opinion that this testimony would not be material and that it would be entirely ineffectual. It does not tend to prove that the act of 1894 was in violation of the contract clause of the Constitution, because what was

done or omitted by commissioners appointed under the act could not affect the terms of the legislative act itself or make the act unconstitutional. Furthermore, after a full hearing upon the question of duress, this court has already decided that all the proceedings which took place under the act of 1894 were entered into
146 voluntarily by the complainant in order to avoid great disaster arising from municipal competition.

Our conclusion upon this point is conclusive against the admission of the testimony offered by the plaintiff, that the commissioners did not value the water contract.

The motion to enter the final decree dismissing the bill is granted.

146a Circuit Court of the United States, District of Massachusetts.
In Equity.

GLOUCESTER WATER SUPPLY COMPANY
v.
CITY OF GLOUCESTER. } No. 1519.

L. L. Scaife, Robert M. Morse, for complainant.

A. E. Pillsbury, specially, John J. Burke, Charles A. Russell, for defendant.

Docket Entries.

May T., 1901, July 1.—Bill filed, subpœna issued, returnable Aug. rules, to wit: Aug. 5, 1901.
Sept. 3.—Demurrer filed.
May T., 1902, June 23.—Heard on demurrer before Colt, J.
" " Colt, J. Rescript filed, demurrer sustained.
Sept. 30.—Agreement to amend record filed.
Oct. 1.—Colt, J. Final decree, bill dismissed with costs, decree in files.
Oct. T., 1902, Dec. 8.—Claim of appeal filed.
" "—Assignment of errors filed.
" "—Colt, J. Bond on appeal approved and filed and appeal allowed.
" "—Colt, J. Citation issued, returnable Jan. 5, 1903.

147 *Claim of Appeal.*

(Filed Dec. 8, 1902.)

The above named plaintiff, Gloucester Water Supply Company, considering itself aggrieved by the order and decree entered October 1, 1902, in the above entitled proceedings, doth hereby appeal from said decree to the Supreme Court of the United States, and

prays that this its appeal may be allowed, and that the transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

ROBERT M. MORSE,
LAURISTON L. SCAIFE,
Counsel for Plaintiff.

148 *Assignment of Errors.*

(Filed Dec. 8, 1902.)

Comes now The Gloucester Water Supply Company, appellant, (the plaintiff in the court below,) and says that there is manifest error in the records and proceedings of the circuit court of the United States for the district of Massachusetts in this suit as follows:

I. The court erred in this: That it held that the plaintiff has not been deprived of its property without due process of law in violation of the fourteenth amendment to the Constitution of the United States.

II. The court erred in this: That it held that the plaintiff failed to establish a taking of its property without just compensation under the authority of the State.

III. The court erred in this: That, although it held that the sale of the company's property was compulsory in fact, it held that such sale was not compulsory in law.

IV. The court erred in this: That it did not hold that the act of 1895, being chapter 451 of the Massachusetts Acts of 1895, was compulsory in law as well as in fact, and constituted duress.

V. The court erred in this: That it held, in effect, that the threatened grant to the defendant, The City of Gloucester, of a competing franchise under said act of 1895 (being chapter 451 of Massachusetts Acts of 1895) was a lawful exercise of legislative power.

149 VI. The court erred in this: That it did not hold that by said act of 1895, (chapter 451 of Massachusetts Acts of 1895), as construed and applied as alleged in plaintiff's bill in this suit, the State or Commonwealth of Massachusetts deprived and deprives plaintiff of its property without due process of law, in violation of the fourteenth amendment to the Constitution of the United States and of plaintiff's rights thereunder.

VII. The court erred in this: That it held, in effect, that the obligation of no contract of the plaintiff has been impaired in violation of the contract clause of the Constitution of the United States, to wit, section 10 of article I of the Constitution of the United States.

VIII. The court erred in this: That it did not hold that said act of 1895 (being chapter 451 of Massachusetts Acts of 1895), impaired and impairs the obligation of plaintiff's contracts with defendant, The City of Gloucester, alleged in plaintiff's bill in this suit, (including plaintiff's franchises), and thereby violates section 10 of article

I of the Constitution of the United States and plaintiff's rights thereunder.

IX. The court erred in this: That it held in effect that, by said act of 1895, (being chapter 451 of Massachusetts Acts of 1895), as construed and applied as alleged in plaintiff's bill in this suit, the State or Commonwealth of Massachusetts did not and does not deny to plaintiff the equal protection of the laws in violation of the fourteenth amendment to the Constitution of the United States and of plaintiffs rights thereunder.

X. The court erred in this: That it did not hold that, by said act of 1895 (being chapter 451 of Massachusetts Acts of 1895),
150 as construed and applied as alleged in plaintiff's bill in this suit, the State or Commonwealth of Massachusetts denied and denies to plaintiff the equal protection of the laws, in violation of the fourteenth amendment to the Constitution of the United States and of plaintiffs rights thereunder.

XI. The court erred in this: That it held as follows: "This case, in our opinion, is governed by the case of The Newburyport Water Company *vs.* City of Newburyport."

XII. The court erred in this: That it sustained the defendant's demurrer to plaintiff's bill.

XIII. The court erred in this: That it ordered, adjudged and decreed that the plaintiff's bill be dismissed, with costs to the defendant to be taxed by the clerk.

XIV. The court erred in this: That it did not overrule the defendant's demurrer.

Wherefore the said Gloucester Water Supply Company, appellant, prays the honorable court to examine and correct the errors assigned, and for a reversal of the decree of the said circuit court entered in the above cause.

GLOUCESTER WATER SUPPLY COMPANY,
By ROBERT M. MORSE,
LAURISTON L. SCAIFE,
Counsel.

LAURISTON L. SCAIFE,
Solicitor for Gloucester Water Supply Company.

151 *Bond to Party on Appeal.*

(Filed and approved Dec. 8, 1902.)

Know all men by these presents, that we, The Gloucester Water Supply Company, of Massachusetts, as principal, and George H. Norman, as surety, are held and firmly bound unto the City of Gloucester of Massachusetts, in the full and just sum of five hundred dollars to be paid to the said City of Gloucester, its certain attorney, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this sixth day of December, in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a circuit court of the United States for the district of Massachusetts, in a suit in equity depending in said court between said Gloucester Water Supply Company, plaintiff, and said City of Gloucester, defendant, a decree was entered against the said Gloucester Water Supply Company and the said Gloucester Water Supply Company having obtained an appeal to remove said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said City of Gloucester citing and admonishing it to be and appear in the said Supreme Court of the United States at Washington, on the fifth day of January, A. D. 1903.

Now, the condition of the above obligation is such, that if the said Gloucester Water Supply Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its appeal good, then the above obligation to be void; else to remain in full force and virtue.

GLOUCESTER WATER SUPPLY COMPANY, [SEAL.]
By GEORGE H. NORMAN.
GEORGE H. NORMAN. [SEAL.]

Sealed and delivered in presence of
C. E. COWAN,
(As to G. W. S. Co. and G. H. N.)

Approved:
LE BARON B. COLT,
Circuit Judge.

152 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to City of Gloucester, a municipal corporation duly established under the laws of the Commonwealth of Massachusetts and located in the county of Essex, in said Commonwealth, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington, D. C., on the* fifth day of January next, pursuant to an appeal duly obtained from a decree of the† circuit court of the United States for the district of Massachusetts wherein The Gloucester Water Supply Company, a corporation duly established under the laws of the Commonwealth of Massachusetts, and located therein, is appellant and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Le Baron B. Colt, judge of the circuit court of the United States for the district of Massachusetts, this eighth day of December, in the year of our Lord one thousand nine hundred and two.

LE BARON B. COLT,
U. S. Circuit Judge.

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* Not exceeding 30 days from the day of signing.
† Name of court in which the decree is entered.

153 *Acknowledgment of Service on Citation on Appeal.*

DEC. 11, 1902.

Service of the within citation is hereby accepted, with the same effect as though the same had been served by the marshal, but without prejudice to any other rights of the appellee.

A. E. PILLSBURY,
For The City of Gloucester, Appellee.

154 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *District of Massachusetts,* } *ss:*

I, Alexander H. Trowbridge, clerk of the circuit court of the United States for the district of Massachusetts, within the first circuit, certify that the foregoing is a true copy of the record and all proceedings in the cause in equity entitled, No. 1519 Gloucester Water Supply Company, complainant, *v.* City of Gloucester, defendant, in said circuit court determined, the opinions of the circuit court, dated, respectively, February 24, 1898, August 8, 1900, and March 5, 1902, filed in case No. 924, equity, Newburyport Water Company *v.* City of Newburyport (by which case the court held in the rescript filed herein June 23, 1902, that the present case is governed) the docket entries, the claim of appeal, the assignment of errors and the bond to party on appeal, and also the original citation issued upon the appeal of the complainant in said cause, with the acknowledgment of service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this thirty-first day of December, A. D. 1902.

[Seal of the Circuit Court, Massachusetts.]

ALEX. H. TROWBRIDGE, *Clerk.*

Endorsed on cover: File No. 18,771. Massachusetts C. C. U. S. Term No. 183. The Gloucester Water Supply Company, appellant, *vs.* The City of Gloucester. Filed January 2, 1903.

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I.

"Due process of law," under the Fourteenth Amendment, requires compensation to be made or secured to the owner of private

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property taken under the authority of the state for public use.

This provision controls a taking, whatever may be its form or guise. 59–60

II.

As to what constitutes a taking under the Fourteenth Amendment.

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III.

It is not only settled, as above shown (II.), that the owner of private property may be deprived of it by state action in any form which is in effect or in substance a taking thereof; but it is also settled that a sale which is compulsory in law under a state statute is the equivalent of a taking by the state. 67

IV.

It results from the three preceding points that due process of law under the Fourteenth Amendment requires compensation to be paid or secured to the owner of private property sold to a municipal corporation for public use by a sale which, as regards such owner, is compulsory in law under the state statute which authorizes such sale. 68

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V.

As to what constitutes legal compulsion, and especially compulsion by a government or its officers; and as to the kind of compulsion which constitutes duress, and renders involuntary in law (as well as in fact) what appears to be voluntary.

While ordinarily what may be lawfully done may be lawfully threatened, yet if the government, or an officer of the government acting under color of office, threatens an individual with serious loss, unless the individual will make a contract to do something not required by law, and if the contract is made under the influence of such threat, such contract, though voluntary in appearance, becomes thereby compulsory in fact and in law, and is obtained by duress. 68–69

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As to threats made by a government, or its officers acting under color of office. . 72

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The Tingey case (*United States* v. *Tingey*, 5 Pet. 115). 74

We claim and submit that a careful examination of this case, and an application of it to the present cases, will show the fundamental error of the Circuit Court in its conclusion that, although the sale in the present case was compulsory in fact, it was not compulsory in law. . . . 74

For the conclusion reached in the Tingey case by the present court is that a threat made by an officer of the government under color of his office, which in itself would be a lawful threat, *when coupled with an exaction which is variant from what is required by law*, makes the contract entered into under influence of such threat *compulsory in law* as well as in fact. . 75

Analysis of the Tingey case. 76

The Tingey case cited and approved in subsequent authorities. 80

The Tingey case was deliberately adopted as law by the Supreme Judicial Court of Massachusetts in 1851 in *Boston* v. *Capen*, 7 Cush. 116, at page 124; see pages 123–125. 81

We submit that it is established under the above authorities that the Circuit Court was in error at the crucial point of its own argument; and that its conclusions there *should have been* as follows: —

That while "*ordinarily* what may be lawfully done may be lawfully threatened," yet if the government, or an officer of a government, acting under "color of office," threatens an individual with serious loss

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unless the individual will make a contract to give or do something not required by law, and if the contract is made under the influence of such threat, "there is no pretence then to say it was a [contract] voluntarily given;" but such contract is compulsory in fact and *in law*, and is obtained by *duress*. 82

Johnson v. *Reed*, 136 Mass. 421 (formerly cited for defendant), furnishes an analogy directly in support of our above claim and argument as to the scope and effect of the Tingey case. 84

VI.

Application of the foregoing principles of law to the present case.

A.

The government, that is, in this case, the commonwealth of Massachusetts, by the act of 1894 (c. 474), in effect threatened the plaintiff with serious loss unless the plaintiff would, by an apparently voluntary sale and contract, do something not required by law.

B.

The plaintiff, under the influence of such threat, did what was required, as above, to wit, made the apparently voluntary sale provided for in the act of 1894, which sale included the disputed franchise rights for which plaintiff receives no compensation.

C.

The sale became thereby compulsory in law. . 85–86

[*We seek here to apply the law of Point V. to the facts of the present case, the compli-*

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cations of which necessitated full and careful treatment; and we earnestly beg that our argument hereunder will receive equally full and careful examination and consideration.]

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Anticipated defences to the foregoing. . . 114

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IX.

By such compulsory sale plaintiff's property was taken. 121

X.

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XI.

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XII.

It results from the preceding points that the plaintiff has been deprived of its property by the state or commonwealth of Massachusetts without due process of law.

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XIV.

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XV.

The specific relief which may be finally granted need not be determined now. It is sufficient at present to show that we may

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be entitled to any final relief in respect of the property in issue. We have shown that the entire act of 1894 is unconstitutional; that all action thereunder is void. The entire compulsory sale thereunder was void. The deed thereunder was obtained by compulsion. And under the principles of equity we are entitled at least to a cancellation of the deed and a restoration of the property. 141

XVI.

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I.

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A. This contract for a full supply of water for fire purposes was *expressly exclusive*, because it provided that the Company should at all times during the term of the contract furnish "a full supply of water for fire purposes." 169

B. The exclusiveness of the contract, during its limited term, was an *incident* of the statutory power to make the contract; because —

1. The exclusiveness would not lead to a monopoly as against the City; because

(*a*) The term of the contract was limited.

(*b*) The City had "the right at any time after ten years from the date of the completion of said works to purchase the corporate property and all rights and privileges of said company." . 173

2. The power to make such exclusive contract was given to the parties by the act of 1880. 176

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C. Said contract for the full supply of water for fire purposes was also exclusive by *necessary implication*. 185

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First Proposition of Law.

The constitutional provision prohibiting the impairment of the obligation of contracts relates to and protects all contracts, express and implied. 187

Second Proposition of Law.

Any contract to supply water to a city "is a contract protected by the Constitution of the United States against state legislation to impair it." 188

Third Proposition of Law.

Where a municipal corporation — a city — makes, under legislative authority, a contract with a private corporation, giving the

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latter the exclusive right to furnish such city with gas or water, any subsequent law passed by the state legislature authorizing such city to furnish itself, during the life of such contract, with gas or water, or to obtain the same from any third person or corporation, impairs the obligation of such contract; and is therefore unconstitutional and void. 189

Fourth Proposition of Law.

Any law which abridges, or in any manner changes, the intention of the parties resulting from the stipulations in the contract, necessarily impairs the obligation of such contract. *A fortiori*, a law which extinguishes or destroys a contract impairs the obligation of such contract. . . . 189

Fifth Proposition of Law.

Where a contract has been made under authority conferred by a state statute, any law which such state afterwards makes, and which interferes with or takes away the power of any party to such contract to perform its terms, impairs the obligation of such contract. 191

Sixth Proposition of Law.

In determining whether or not a statute is unconstitutional, the *direct and necessary result* of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be

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Seventh Proposition of Law.

The reserved power does not give to the state or the municipality the right to extinguish the contract, although by it the state may have the power to destroy the corporation 196

Application of the said principles of law to plaintiff's rights under the contract to furnish water for fire purposes. . . . 196

III.

If the act of 1893 was in force after the City voted not to purchase, said act impaired the obligation of plaintiff's said contract to furnish the state with a full supply of water for fire purposes during the life of said contract. 197

IV.

The act of 1894 (including the act of 1893 as revived and amended by the act of 1894) impaired the obligation of said contract, unless the plaintiff Company waived its constitutional rights by making a voluntary sale.

The sale was not voluntary; but was compulsory in fact and in law. 199

Municipal competition meant ruin, and ruin would have rendered the plaintiff Company unable to perform its part of the contract to furnish water for fire purposes, and would therefore have destroyed plaintiff's right to demand of the City the annual rental provided by the contract. . 200

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But the sale under the act of 1894, though voluntary in form and appearance, was compulsory in fact and in *law*. . . . 200

The argument upon the similar point under the Fourteenth Amendment is based upon the assumption that the threat of municipal competition, in and of itself, would have been a *lawful* threat. 201

We now show that **the threat of municipal competition, in and of itself, was unlawful**; because it violated the obligation of plaintiff's contract with the City, which had been made under the authorization of the state. 201

Wherefore we claim and submit that the act of 1894 (including the act of 1893 as revived and amended by the act of 1894) impaired the obligation of said contract. . . 204

We submit the above conclusion is not changed by the decision or reasoning in the recent case of *Joplin* v. *South West Missouri Light Co.*, 24 U.S. Supreme Court Reporter (part No. 2), p. 43, decided November 16, 1903. 204

V.

Plaintiff was entitled to act upon the threat; the law does not compel the victim to wait until ruin overtakes him and then leave him to resort to a court of law for damages; but he is entitled to relief in equity. . . 207

VI.

1. Although we have only argued under the contract clause of the Constitution that the provisions in the said acts of 1893 and 1894, authorizing the city to furnish itself with

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water for fire purposes is unconstitutional, it follows that said entire acts were unconstitutional and void.

2. The specific relief which may be finally granted needs not to be determined now. It is sufficient at present to show that we may be entitled to any final relief in respect to the property in issue.

Under the principles of equity we are entitled at least to a cancellation of the deed and a restoration of the property. . . . 208

VII.

The state, like an individual, is estopped by contracts made by it or under its authority; and is estopped here by the authorized contract for water for fire purposes from taking any position tending to prevent the plaintiff from carrying out such contract. 209

As to attempted defences. 211

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Concerning the alleged violation of the Fourteenth Amendment. 230

General statement of plaintiff's grievance under the provision of the Fourteenth Amendment relating to "due process of law." . . 230

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The main distinctions between the Newburyport and Gloucester cases. 231

Our argument in the Gloucester case is by reference to the corresponding points in our argument upon the Newburyport case, with such additions and changes as are required and permitted by the distinctions between the two cases. 234

I.

[Same as I., *ante*, p. 59.] 235

II.

[Same as II., *ante*, p. 62.] 235

III.

[Same as III., *ante*, p. 67.] 236

IV.

[Same as IV., *ante*, p. 68.] 236

V.

As to what constitutes legal compulsion, and especially compulsion by a government or its officers; and as to the kind of compulsion which constitutes duress, and renders involuntary in law (as well as in fact) what appears to be voluntary.

While ordinarily what may be lawfully done may be lawfully threatened, yet if the government, or an officer of the government acting under color of office, threatens an individual with serious loss unless the individual will make a contract to do something not required by law, and if the contract is made under the influence of such threat, such contract, though voluntary in

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appearance, becomes thereby compulsory in fact and in law, and is obtained by duress. 236

In addition to the argument upon the similar point (*ante*, pp. 68–72), note that a person may be punished heavily under the criminal laws of Massachusetts, who, in writing, threatens what, without threat, he could lawfully do, viz., cause the arrest of the guilty party. 236

Under this statute it was held that the offence may be committed in an endeavor to obtain only that which is justly due to the defendant. 237

Particular attention is called to the Circuit Court's inaccurate use of the cases examined by it upon this crucial point. . . 238–239

VI.

Application of the foregoing principles of law to the present case.

A.

The government, that is, in this case, the commonwealth of Massachusetts, by the act of 1895 (c. 451), in effect threatened the plaintiff with serious loss unless the plaintiff would by an apparently voluntary sale and contract do something not required by law.

B.

The plaintiff, under the influence of such threat, did what was required as above, to wit, made the apparently voluntary sale provided for in the act of 1895, which sale included the disputed franchise rights for which plaintiff receives no compensation.

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C.

The sale became thereby compulsory in law. 240

[*As under Point VI. in the index of the Newburyport case, we must beg again here that the court examine our argument under this point fully and carefully, and also note the distinctions between the two cases at this point.*]

We submit it follows that we have established and sustained the *third, fourth, and fifth assignments of error.* 251

Anticipated defences to the foregoing. . . 252

The state court's opinion that "the sale to the City was not obligatory on the Water Company," with the subsidiary statements that "the franchise of the Gloucester Water Supply Company was not an exclusive franchise," and that "the Company was given the option of selling its property to the City," — is not binding upon the present court, which, according to its own decisions, must construe the statute for itself. 252

VII.

That the Company filed with the city clerk of said City "a specification and description" of the property comprised in the sale is immaterial. The sale remains compulsory in fact and in law. 253

The form of the transfer in the Gloucester act tends to confirm our claim that the sale was obviously compulsory and was a taking by the state. 253

In the Gloucester act, although terms of *sale* are used, the transfer was to be made by

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operation of the statute alone, and **without a deed.** 254

This is all the more significant when we realize that the City would need a record title to the real estate, and that —

Under the laws of Massachusetts no deed can be recorded unless it contains a solemn acknowledgment before a justice of the peace or other magistrate that it was the *free* act and deed of the grantor. . . 254

VIII.

The sale, which was compulsory in law, was for a public use of the property. . . 257

IX.

By such compulsory sale plaintiff's property was taken. 257

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X.

The property of plaintiff was taken under color of the authority of the state or commonwealth of Massachusetts. . . . 257

XI.

The plaintiff, a private corporation, is a "person" within the Fourteenth Amendment. . 257

XII.

It results from the preceding points that the plaintiff has been deprived of its property by the state or commonwealth of Massachusetts without due process of law.

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The error specified in the first assignment of error (*post*, p. 259) is therefore shown, and the decree of the Circuit Court should be reversed. 257–258

We submit it follows that we have established and sustained the *first, second, and sixth assignments of error*. 258–259

XIII.

The provisions of the act of 1895 constitute an "entirety."

The part of the act which we have shown to be unconstitutional, cannot be separated from the remainder without violating the obvious intent of the statute.

The entire act is therefore unconstitutional and void. 259

XIV.

As to defendant's claim of laches. 259

XV.

The specific relief which may be finally granted need not be determined now. It is sufficient at present to show that we may be entitled to any final relief in respect of the property in issue. We have shown that the entire act of 1895 is unconstitutional; that all action thereunder is void. The entire compulsory sale thereunder was void. And under the principles of equity we are entitled at least to a restoration of the property and a decree in equity which shall remove the cloud upon plaintiff's title arising from filing such "specification," which might be held, by force of the peculiar

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[18,770. 18,771.]

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 182.

THE NEWBURYPORT WATER COMPANY,
APPELLANT,

v.

THE CITY OF NEWBURYPORT.

No. 183.

THE GLOUCESTER WATER SUPPLY COMPANY,
APPELLANT,

v.

THE CITY OF GLOUCESTER.

Brief for Appellant in Each Case.

The Newburyport Case. (No. 182.)

Statement.

Jurisdictional Facts.

The plaintiff (appellant) is a Massachusetts corporation established to supply water to the defendant, the City of Newburyport, a Massachusetts municipal corporation, and its inhabitants. (R. 1.)*

* For brevity, the references to the Transcript of Record of the Newburyport case are abbreviated to the above, *R. 1*.

The suit is of a civil nature, in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2000, to wit, more than $475,000. (R. 16.)

The suit is also one arising under the Constitution of the United States.

That it involved constitutional questions *ab initio* appears in the bill (R. 14, 15), where plaintiff claims violations of its rights under the Constitution of the United States, and particularly alleges the violation of article XIV. of the Amendments to the Constitution of the United States, and of plaintiff's rights thereunder, and the violation of section 10 of article I. of the Constitution of the United States and of plaintiff's rights thereunder. (R. 14, 15, and Amendment to Bill, R. 56, 57.)

Facts relating to Time of taking and entering Appeal.

The final decree, dismissing plaintiff's bill, was made and entered March 5, 1902. (R. 107, 131.)

The appeal to the present court was allowed and the bond approved and filed December 8, 1902. (R. 131.)

The assignment of errors was filed December 8, 1902. (R. 131.)

The appeal was entered and docketed in the Supreme Court of the United States January 2, 1903.

General Statement of Plaintiff's Grievance under the Provision of the Fourteenth Amendment relating to "Due Process of Law."

Plaintiff's grievance as to "due process of law" is, shortly stated, that, although the sale under chapter 474 of the Massachusetts acts of 1894 was *voluntary in form*, it was *compulsory in fact and in law;* that such compulsory sale constituted *in effect* a *taking* of plaintiff's property; that that statute, as construed by the Supreme Court of Massachusetts, provided for compensation for only *part*

of the property taken; that the part for which no compensation whatever was provided consisted of certain franchise rights which were of the value of more than $475,000; that the taking of such part of our property without compensation was in violation of plaintiff's rights under the Fourteenth Amendment to the Constitution of the United States, as hereinafter shown.

Statement of the Case.

In 1878 an act was passed by the legislature of Massachusetts (St. 1878, c. 240), authorizing the City of Newburyport to establish a system of water supply, which act required for its acceptance a two-thirds vote of the voters present and voting in said city. A vote was had thereon, but the City declined to accept the act.

After this action by the City, viz., in 1880, the legislature enacted chapter 235 of the acts of that year, incorporating the plaintiff corporation and authorizing it to furnish a water supply for the City and its inhabitants. (R. 18.) Section 11 of this act provided that the City should have the right, at any time after ten years from the completion of the works of the Company, to purchase the Company's property and all the rights and privileges of the Company at a price which might be mutually agreed upon between the Company and the City, and if the parties were unable to agree upon a price, then the same was to be determined by commissioners.

This act was accepted by the incorporators, and the Company proceeded forthwith to purchase and take the necessary property and to establish a system of water supply, and it supplied the City and its inhabitants with water from October 31, 1881, until January 31, 1895, when all of its property was acquired by the City under the circumstances hereinafter stated.

The Company has as yet received no compensation for

this property, which is alleged in the bill to be of the value of at least $750,000, while the City has received the entire revenues since January 31, 1895.

August 17, 1880, a contract was made between the Water Company and the City, in accordance with the provisions of chapter 235 of St. 1880, sec. 8, which contract was to run for twenty years from October 1, 1881, unless the City should purchase the property of the Water Company in accordance with section 11 of said chapter 235, whereby it was agreed that the Company should furnish the City with water and the City should pay the compensation therein provided.

In 1893 the City of Newburyport procured the passage of St. 1893, c. 471, by which it was authorized to establish an independent system of water supply. Section 12 of this act provided that at any time within sixty days after the passage of the act, the Water Company might notify the mayor of Newburyport in writing that it desired to sell its property to the City, and might execute and deliver proper deeds thereof, and that if a majority of the voters of the City should then vote to purchase the property, the same should become the property of the City and the City should be liable to pay the fair value thereof, and in case the parties were unable to agree upon the value, the same should be determined by commissioners. Section 13 provided that after the vote provided for in section 12, or if the Water Company should not notify the mayor within sixty days, the act should be submitted to the voters of the City for their acceptance or rejection, and should take effect after its acceptance by two-thirds vote of the voters of the City present and voting thereon. The Water Company, in pursuance of this act, notified the City of its desire to sell its property to the City, but the citizens, by a majority vote, declined to purchase the same. Subsequently the citizens voted by more than a two-thirds vote to accept the act of 1893. It is claimed by the Water Company that this last

vote was unauthorized by the statute, and that the statute of 1893 was void because of the preceding vote *not* to purchase. The City, however, has claimed and claims that section 12 of the statute of 1893 authorized this vote to be taken, although the City had voted not to buy the property of the Water Company, and that therefore the act of 1893 was and is in force. The City was advised that the statute of 1893 was in force, and, claiming to act under the authority of that statute, employed an engineer to make surveys for the establishment of an independent water supply, and incurred expense therefor. (Stipulation I. (*e*), (*f*), R. 90.)

As it was apparent from these proceedings that the City was intending to destroy the Water Company by competition, or by threats of competition, the latter applied to the legislature of 1894 for the passage of an act requiring the City to buy the property of the Water Company before it should proceed to supply itself with water under the act of 1893. The City opposed the passage of this act, and at legislative hearings upon the subject the mayor of Newburyport stated that when the City went into competition with the Water Company the natural effect of it would be to ruin the latter; that he did not see any other way for it; that he did not think that the Company could compete with the City, and that he wanted the legislature to leave the City as it was under the act of 1893. (Affidavit of Thomas E. Major, and Stipulation I. (*g*), R. 93, 90–91.) The legislature failed to enact the statute as requested by the Water Company, but it passed an act (St. 1894, c. 474) by which it was provided that if within thirty days after the passage of the act the Water Company should notify the City of its desire to sell its property to the City, the City should not proceed to establish a water supply under the provisions of St. 1893, c. 471, unless it should have first bought the property of the Company; but it was provided that in determining the value of the property the same

should be estimated without enhancement on account of its future earning capacity or good-will or its franchise.

As the result of this legislation and these proceedings by the City, the latter held the Water Company by the throat, and could practically compel it to yield up its property on a basis of valuation which must necessarily exclude its most valuable rights. If the Water Company failed to offer its property to the City in accordance with the provisions of the act of 1894, the City would claim that it was relieved from any further restraint as to establishing an independent system, and could proceed to do so; and, although it might be clear that if the statute of 1893 stood alone it did not become effective in view of the peculiar provision of sections 12 and 13, yet that it was by no means certain that it might not be held that the effect of the statute of 1894 was to make the statute of 1893 effective in case the Water Company should fail to notify the City of its desire to sell. Under these circumstances, and having only thirty days within which to determine what to do, the stockholders of the Water Company, believing that the City was liable to compete with the Water Company, and that such competition would ruin the Company, notified the City of its desire to sell its property in accordance with the statute of 1894.

Subsequently the Water Company petitioned for the appointment of commissioners for the valuation of its property under the statute of 1894, and such commissioners were appointed, and heard the parties, and made a report, which was accepted by the Supreme Court; but no judgment has been entered in said court, and no payment on account of the same has been offered or received. In the report of the commissioners it is stated that by the terms of the act of 1894 they considered that they were required to exclude from their consideration the income derived by the Company from its business, and all franchise rights of the Company and its good-will, though they find that these

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franchises were valuable. The report then came before a single justice of the Supreme Court, who did not pass upon this construction, but reserved it for the full court, which subsequently approved the construction of the commissioners.

This bill was brought before final judgment on the petition in the state court.

In the opening on behalf of the Water Company before the commissioners, counsel for the Water Company claimed that if the effect of the act of 1894 was to take from the Company, without compensation, any property or rights acquired by it under its charter, to that extent the act of 1894 was unconstitutional. (R. 93.)

It is to be noted that under the law of Massachusetts the Water Company could not, in proceeding under the act, question its constitutionality; but was permitted to proceed under the act and question its constitutionality later by an independent bill in equity.

Such was the bill in the present case; and it was open to bring such bill either in the state court or (as was actually done) in the United States Circuit Court.

Shortly stated, the plaintiff claims that, although the statute of 1894 provided for a sale which was apparently voluntary, such sale was compulsory in fact and in law, and in effect was a taking of plaintiff's property under the authority of the state, which provided compensation for only part of the property so taken, and therefore was in violation of the provision of the Fourteenth Amendment in reference to due process of law.

The bill also claims that the statute of 1894 was in violation of plaintiff's rights under the clause of the federal Constitution relating to the obligation of contracts.

The important points disclosed by the foregoing statement of facts are, —

1. That the City of Newburyport, after full opportunity and consideration of the subject, determined not to invest

its own capital in the establishment of a water plant, and therefore impliedly agreed that it would permit and approve the action of private parties in undertaking such work.

2. That private parties came forward and embarked their capital and skill in the establishment and development of a water system.

3. That the act under which this was done authorized the City, at any time after ten years from the completion of the works, to wit, at any time after October 31, 1891, to buy the property of the Company at a fair value, and that both the parties who were incorporated under this act and the City of Newburyport understood perfectly well that either the Company should be entitled to retain and enjoy its property, or that, if the City bought it, it should buy the Company's whole property at a fair value.

This constituted a contract binding both in law and in honor on the Commonwealth and on the City of Newburyport.

4. That the City, by its express contract with the Company of August 17, 1880, agreed to pay the Company for water for twenty years from October 1, 1881, unless it should purchase the property of the Water Company in accordance with the statute of 1880.

5. That the City permitted the Water Company to incur the large expenses necessarily involved in a work of such magnitude, and to hold its property during the earlier years of its development, when its returns would be naturally small, but in 1893 conceived the plan of ruining the Company, and, as a first step, procured the passage of the act of 1893. This act, however, did not contemplate the payment of anything less than a fair price for the value of the property of the Water Company; but the City's construction of the law was that after it had failed to buy the property of the Company it had still authority to establish an independent water supply, and publicly acted as if it so believed it.

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6. That, by the statute of 1894, the City, under the authority of the statute, drove the Company into the alternative above stated, as a result of which it has obtained all the property of the Company; and, unless the latter can be protected from these proceedings in this court, it will receive as compensation a sum which represents only a small part of the valuable properties of the Company which the City has acquired.

As the City has set up in its answer a reference to the use of the Merrimac River water by the Water Company, and as certain facts in relation to the same have been agreed to in the stipulation, it may be proper to call attention to them, although the Water Company claims that they are entirely irrelevant to the present discussion. In 1889 the Water Company laid a pipe from its works to the Merrimac river, and in June, 1892, the Company pumped water from the river into its supply from the City, and continued so to do at intervals until March, 1893, since which time no use has been made of the Merrimac River water. It is conceded that the Company was not authorized to use the Merrimac River water. The state board of health had disapproved the river as a source of domestic water supply unless the water therefrom was filtered; but the cities of Lawrence and Lowell used the water for the purpose of domestic supply without filtration. These cities, as well as the city of Haverhill, were above the city of Newburyport on the river, and all three cities, as well as the town of Amesbury, discharged their sewage into the river. The city of Lawrence, at that time a place of 44,000 inhabitants, drew its water supply from the river without filtration, although the city of Lowell, of 77,000 inhabitants, above it, discharged its sewage into the river as above stated. The Newburyport Water Company laid its pipe to the river as a possible safeguard, in case of extreme drought or interruption of its regular supply. It did not use the water

for more than three years after the pipe was laid. It then used it only at intervals, and in comparatively small quantities, and there is no proof that this water, mixed as it was with the general supply from the Company's works, ever caused epidemic, or even a single case of illness; and there is nothing in the stipulation from which the court can find that such was the fact. It is true, however, that some physicians and the state board of health attributed some illness in the winter of 1892–1893 to the use of the Merrimac River water, and that this fact was presented to the legislative committee in 1893; but it made so little impression upon that committee that the latter reported against the enactment of the statute petitioned for by the City.

Inasmuch as the Water Company was not authorized by law to use the Merrimac River water, it is needless to say that if, after objection was raised to the use of the water, it had continued to do so, it could have been easily restrained by proper legal proceedings; so that the suggestion that the statute of 1893 was passed either to prevent the possibility of further use of the Merrimac River water, or to punish the Company for its past use, is equally irrelevant to this case.

History of the Newburyport Case.

The bill was filed July 21, 1897.

September 9, 1897, the defendant filed a motion to dismiss the bill for want of jurisdiction.

September 13, 1897, that motion was heard and denied.

September 27, 1897, the defendant filed a demurrer to the bill, which was heard October 23, 25, and 30, 1897.

February 24, 1898, the demurrer was overruled.

April 14, 1898, defendant filed a petition for rehearing on the demurrer, and on the same day defendant filed its answer.

Under this petition for rehearing the defendant filed a

brief, and, at the special request of the court, plaintiff presented to the court a brief in reply, to which the defendant replied in another brief.

November 17, 1898, defendant's petition for rehearing was denied, and on the same day defendant offered to file a special demurrer. Plaintiff objected to the filing of the special demurrer, and the court ordered that the special demurrer be "received."

December 31, 1898, the court heard defendant's motion for leave to file special demurrer, and on January 7, 1899, denied that motion.

Plaintiff's replication was filed June 15, 1899.

With the consent of both parties the court thereafter made the following order: —

> "ORDERED: That the constitutional question, — to wit, whether or not the plaintiff has been deprived of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, — be first heard; and that all questions as to plaintiff's relief, if any (including questions of valuation of the property alleged to have been taken), await the determination of the constitutional question." (R. 92.)

The constitutional question was argued before COLT and BROWN, JJ., June 28, 29, and 30, 1899 (R. 130); and on August 8, 1900, the court rendered its decision and opinion thereon in favor of the defendant. (R. 113.)

As the decision of August 8, 1900, was only upon the question under the Fourteenth Amendment, the plaintiff claimed the right to a further hearing upon the claim under the contract clause of the Constitution. That this right was conceded by the Circuit Court is shown by the further record, showing that January 10, 1901, a special examiner was appointed (R. 130); and March 22, 1901, a

stipulation was filed (R. 94); and that on May 22, 1901, the case was heard before COLT and BROWN, JJ., on questions raised by the stipulation filed March 22, 1901. (R. 130.)

It should be noted that, in the order for the hearing upon the constitutional question (June 20, 1899), it was provided that all questions as to plaintiff's relief, if any (including questions of valuation of the property alleged to have been taken), should await the determination of the constitutional question. In the stipulation (R. 94) which preceded the next hearing it was further agreed that all questions of relief should await the final determination of the question whether plaintiff was entitled to any relief, etc. The hearing thereon was upon May 22, 1901, and the decision following thereafter was rendered January 21, 1902. (R. 130.) The record does not include the *per curiam* opinion *in the form in which it first came down*, but gives only the amended opinion *per curiam* filed March 5, 1902. (R. 128, 131.) The docket entry of January 21, 1902, shows, however, that the court had decided against the plaintiff: "Opinion *per curiam*. 'The motion to reopen the case is denied; and the motion to enter a final decree dismissing the bill is granted.'" (R. 130.)

The case was finally disposed of March 5, 1902, as shown by the following docket entries of that date: —

"Mar. 5. — COLT & BROWN, JJ. Ordered that second docket entry of May 22, 1901, be amended so as to read as follows: 'May 22 Heard before COLT and BROWN, JJ. on questions raised by stipulation filed March 22, 1901; it being orally agreed that said hearing shall be also a final hearing in the case.'

"Mar. 5. — Ordered further that the opinion *per curiam* filed Jan. 21, 1902, be amended and the docket entry of that date vacated.

"Mar. 5. — Amended opinion *per curiam* filed.
"Mar. 5. — Motion for final decree granted.
"Mar. 5. — Final decree, bill dismissed with costs — decree in files." (R. 131.)*

The amended opinion *per curiam* of March 5, 1902, shows that the hearing subsequent to the opinion of August 8, 1900, was in reference to plaintiff's claim that its rights under the clause of the Constitution relating to the "obligation of contracts" had been violated. (R. 128, 129.)

The final decree specifically passed upon plaintiff's alleged rights under the Fourteenth Amendment and under the contract clause of the Constitution of the United States, and dismissed plaintiff's bill, thus denying plaintiff's said claims under the Constitution of the United States. (R. 107.)

The Questions Involved in the Newburyport Case.

An examination of the pleadings and the stipulations filed in lieu of taking testimony, and of the opinions of court, and of the final decree filed in this case, all as they appear in the transcript of record, will show that the following questions are involved in this case, and that they arise upon the appeal from the final decree of the Circuit Court: —

First. Was the plaintiff deprived of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States?

Second. Did the plaintiff fail to establish a taking of its property without just compensation under the authority of the State of Massachusetts?

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*As to facts relating to the appeal, see *ante*, p. 2.

Third. Was the sale of the plaintiff's property compulsory in law as well as in fact?

Fourth. Did the Circuit Court err in that it did not hold that the act of 1894 (including the act of 1893, as re-enacted by the act of 1894) was compulsory in law as well as in fact, and constituted duress?

[The said act of 1894 is chapter 474 of the Massachusetts acts of 1894; and the said act of 1893 is chapter 471 of the Massachusetts acts of 1893.]

Fifth. Did the Circuit Court err in holding "that the threatened grant of such a franchise under the act of 1894 (admitting this to be the effect of the act), was a lawful exercise of legislative power"?

Sixth. Did the said act of 1894 (including the act of 1893 as re-enacted by said act of 1894), as construed by the highest court of Massachusetts, authorize a taking of plaintiff's property without just compensation; and did it thereby deprive plaintiff of its property without just compensation, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States?

Seventh. Did the Circuit Court err in that it decreed that the obligation of no contract of the plaintiff has been impaired in violation of the contract clause of the Constitution of the United States, to wit, section 10 of article 1 of the Constitution of the United States?

Eighth. Did the Circuit Court err in excluding the testimony offered by plaintiff, to the effect that the commissioners appointed by the state court to value complainant's property, under the act of 1894, did not in fact value the water contract entered into between the complainant and defendant?

See Eighth Assignment of Error; *post*, p. 18; also R. 133.

The remaining questions are perhaps, in effect, repetitions of some of the former questions, but are inserted in a different form, out of abundant caution.

Ninth. Did the Circuit Court err in that it did not hold, adjudge, and decree that the said act of 1894 (including said act of 1893 as re-enacted by said act of 1894), as construed and applied by the highest court of the state of Massachusetts, impaired and impairs the obligation of contracts belonging to plaintiff, in violation of section 10 of article I. of the Constitution of the United States, and of the plaintiff's rights thereunder? (R. 133.)

Tenth. Did the Circuit Court err in that it ordered, adjudged, and decreed that plaintiff's bill be dismissed with costs to the defendant? (R. 133.)

Eleventh. Did the Circuit Court err in that it did not adjudge and decree that plaintiff is entitled to relief? (R. 133.)

It would seem that the above questions may be condensed into the following: —

FIRST.

Was the plaintiff deprived of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States?

It will appear that the principal question involved in the above is —

(A) *Was the property of the plaintiff, or any part of it, (1) taken under the authority of the state of Massachusetts (2) without just compensation?*

And it will appear that the crucial question involved in A is —

(a) *Was the sale of the plaintiff's property compulsory in law as well as in fact?*

SECOND.

Did the Circuit Court err in that it decreed that the obligation of no contract of the plaintiff has been impaired in violation of the contract clause of the Constitution of the United States, to wit, section 10 of Article I. of the Constitution of the United States?

THIRD.

Did the Circuit Court err in excluding the testimony offered by plaintiff to the effect that the commissioners appointed by the state court to value complainant's property under the act of 1894 did not in fact value the water contract entered into between the complainant and defendant?

FOURTH.

Did the Circuit Court err in that it ordered, adjudged, and decreed that plaintiff's bill be dismissed with costs to the defendant?

Specification of Errors.

(*Newburyport Case.*)

We rely upon all the errors asserted in our *Assignment of Errors* (R. 131), as follows: —

"I.

The court erred in this:

That it held, adjudged and decreed that the plaintiff has not been deprived of its property without due process of law in violation of the fourteenth amendment to the Constitution of the United States.

II.

The court erred in this:

That it held that the plaintiff failed to establish a taking of its property without just compensation under the authority of the State.

III.

The court erred in this:

That, although it held that the sale of the company's property was compulsory in fact, it held that such sale was not compulsory in law.

IV.

The court erred in this:

That it did not hold that the act of 1894 (including the act of 1893 as re-enacted by the act of 1894,) was compulsory in law as well as in fact, and constituted duress.

The said act of 1894 is chapter 474 of the Massachusetts Acts of 1894; and the said act of 1893 is chapter 471 of the Massachusetts Acts of 1893.

V.

The court erred in this:

That it held 'that the threatened grant of such a franchise under the act of 1894 (admitting this to be the effect of the act) was a lawful exercise of legislative power.'

VI.

The court erred in this:

That it did not find and hold that the act of 1894, (including the act of 1893 as re-enacted by said act of 1894) as construed by the highest court of Massachusetts in effect authorized a taking of plaintiff's property without just compensation; and that thereby and thereunder the State of Massachusetts deprived plaintiff of its property without just compensation in violation of the provision of the fourteenth amendment to the Constitution of the United States.

The said act of 1894 is chapter 474 of the Massachusetts Acts of 1894; and the said act of 1893 is chapter 471 of the Massachusetts Acts of 1893.

VII.

The court erred in this:

That it adjudged and decreed that the obligation of no contract of the plaintiff has been impaired in violation of the contract clause of the Constitution of the United States, to wit, section 10 of article I of the Constitution of the United States.

VIII.

The court erred in this:

That it excluded the testimony offered by plaintiff to the effect that the commissioners appointed by the State court to value complainant's property under the act of 1894 did not in fact value the water contract entered into between the complainant and defendant. The testimony so offered and rejected was offered under a stipulation between the plaintiff and defendant, which is set forth in the record in the circuit court at page 125 *et seq.*, and the testimony so offered and excluded is stated therein as follows:

'It is hereby agreed, if in the opinion of the court the testimony of the commissioners below referred to is competent evidence, is admissible at this stage of the case, and is material, that the commissioners appointed under Mass. St. of 1893, chap. 471, sect. 12, to value the property of the plaintiff company, if called as witnesses in this cause, would testify, without contradiction, that they did not in fact value as part of said property the contract between the company and the city, of which a copy marked 'Exhibit D' is an- * to the plaintiff's bill, it being their opinion that the same in law could not be valued; and it is also agreed that the same shall be dealt with in like manner as if said commissioners had so testified before the

* Should be "annexed."

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commissioner appointed by the court in this case, and as if said objections as to competency, materiality, and admissibility at this stage of the case had been duly taken before such commissioner and reserved for the consideration of the court; and it is also agreed that the petitioner at the hearing put the contract in evidence under objection.'

IX.

The court erred in this:

That it did not hold, adjudge and decree that the said act of 1894 (including said act of 1893 as reenacted by said act of 1894), as construed and applied by the highest court of the State of Massachusetts, impaired and impairs the obligation of contracts belonging to plaintiff in violation of section 10 of article I of the Constitution of the United States under* the plaintiff's rights thereunder.

X.

The court erred in this:

That it ordered, adjudged and decreed that plaintiff's bill be dismissed with costs to the defendant.

XI.

The court erred in this:

That it did not adjudge and decree that plaintiff is entitled to relief." (R. 131–133.)

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* Should be "and of."

The Gloucester Case. (No. 183.)

Statement.

Jurisdictional Facts.

The plaintiff (appellant) is a Massachusetts corporation established to supply water to the defendant, the City of Gloucester, a Massachusetts municipal corporation, and its inhabitants.

The suit is of a civil nature, in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2000, to wit, that the same exceeds, exclusive of interest and costs, the sum or value of $900,000. (Gl. R. 18.)

The suit is also one arising under the Constitution of the United States.

That it involved constitutional questions *ab initio* appears in the bill (Gl. R. 17, 18), where plaintiff claims violations of its rights under the Constitution of the United States, and particularly alleges the violation of section 10 of article I. of the Constitution of the United States and of plaintiff's rights thereunder, and the violation of article XIV. of the amendments to the Constitution of the United States and of plaintiff's rights thereunder. (Gl. R. 17, 18.)

Facts relating to Time of taking and entering Appeal.

The final decree, dismissing plaintiff's bill, was made and entered October 1, 1902. (Gl. R. 92, 114.)

The appeal to the present court was allowed and the bond approved and filed December 8, 1902. (Gl. R. 114.)

The assignment of errors was filed December 8, 1902. (Gl. R. 114.)

The appeal was entered and docketed in the Supreme Court of the United States January 2, 1903.

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General Statement of Plaintiff's Grievance under the Provision of the Fourteenth Amendment Relating to "Due Process of Law."

Mutatis mutandis, our general statement here is the same as the general statement in the Newburyport case (*ante*, p. 2).

Plaintiff's grievance as to "due process of law" is, shortly stated, that, although the sale under chapter 451 of the Massachusetts acts of 1895* was *voluntary in form*, it was *compulsory in fact and in law;* that such compulsory sale constituted *in effect* a *taking* of plaintiff's property; that that statute, as construed by the Supreme Court of Massachusetts, provided for compensation for only *part* of the property taken; that the part for which no compensation whatever was provided consisted of certain franchise rights which were of the value of more than $900,000; that the taking of such part of our property without compensation was in violation of plaintiff's rights under the Fourteenth Amendment to the Constitution of the United States, as hereinafter shown.

It is to be noted that the Circuit Court disposed of this case on demurrer in the following—

"*Rescript.*

June 23, 1902.

COLT, J.:

> This case, in our opinion, is governed by the case of *The Newburyport Water Company* v. *City of Newburyport* and the demurrer to the bill is therefore sustained." (Gl. R. 89.)

The Gloucester legislation followed upon the heels of the Newburyport invention of what we claim to be a *taking* of

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* This is erroneously indexed in the record as page 40. It appears at page 48.

private property without just compensation under the form of a statutory sale which is voluntary in appearance, but compulsory in fact and in law.

The resemblance between the Newburyport and Gloucester statutes is very marked; but there are differences which we shall point out; and there were also differences in the steps leading to the final enactment in each case. We shall show that these differences greatly strengthen our argument in the Newburyport case, and are also sufficient to entitle us to a reversal of the decree in the Gloucester case, even if the present court should affirm the decree in the Newburyport case.

History of the Legislation involved, as shown in Plaintiff's Bill.

In 1880 the legislature of Massachusetts passed an act (c. 203, see Gl. R. 22) authorizing the City of Gloucester to construct a water-supply system; which act, however, was rejected by the City (Gl. R. 2), and in the following year an act was passed (1881, c. 167, see Gl. R. 19) incorporating the Gloucester Water Supply Company, and authorizing this Company to construct and operate a water-supply system and to make contracts with the City and others for supplying water, but with the provision (sec. 7) that the City might at any time during the continuance of the charter, purchase from the Company all its property, rights, etc.

Under the provisions of this act the Water Company made contracts in 1886 and 1887 with the City for supplying water, chiefly for fire purposes, for a period of ten years, unless the contract should be sooner terminated by the purchase of the Company's property and franchises by the City, in accordance with the provisions of the act. (Sec. 7, Exhibits C and E, Gl. R. 24–26, 27–31.)

In 1893 the City, instead of purchasing the property of

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the company in accordance with the provisions of the act of 1881 and of the contracts made thereunder, attempted to secure the passage of an act authorizing it to construct and operate competing water works, and with no obligation on its part to buy out the Water Company. (Gl. R. 5, 6, 31, 32.)

In its petition to the legislature the City asked for authority to take, by purchase or otherwise, the waters of any pond, stream, or well, within the limits of the city; thus requesting, not only the means of competing with the Water Company, but of taking any or all of the Water Company's supply.

This proposed legislation was opposed by the Company and was ultimately rejected by the legislature. (Gl. R. 6, 7.) In the following year, however, renewed attempts were made by the City to secure the desired legislation, and although the City was unable to get its proposed bill "reported" by the legislative committee (Gl. R. 7, 8), it succeeded in introducing in the house of representatives, — still against the opposition of the Company, — a substitute bill authorizing municipal competition unless the Company would sell its property to the City upon a valuation which expressly and unmistakably excluded the values of all franchise rights. (Gl. R. 8, 47, 48.)

This substitute bill did not pass in the form presented; nevertheless the City was able, against the never-ceasing opposition of the Company, to obtain the passage of the act of 1895, c. 451, *which authorized municipal competition unless the Company would first sell to the City "all the corporate property and all the rights, privileges,"* etc., . . . "used in supplying said City and its inhabitants with water;" and all at a value which should be "*estimated without enhancement on account of future earning capacity, or future good will, or on account of the franchise of the Company.*" (Act of 1895, c. 451, sec. 16, Gl. R. 53.)

The City of Gloucester accepted the act; the Water Company voted to sell thereunder, giving notice, however, of its claim to constitutional protection; the sale was carried out as provided by the act; and the City took and has retained possession of the property.

The act was accepted, as provided therein, by the City, July 23, 1895 (Gl. R. 9), and on August 15, 1895, the Company gave to the City the required notification under the provisions of the act (Gl. R. 10, 11), and delivered therewith a copy of the vote to sell as passed by the Company; which vote contained the Company's claim for just compensation for the property and rights to be sold and its claim that "if said chapter 451 of the Statutes of 1895 undertakes to authorize said city to acquire said franchise and property for less than the just, reasonable and full compensation therefor, such provision is unconstitutional and void." (Gl. R. 9, 10; Exhibit L, R. 54.)

[These claims, thus officially brought to the attention of the City, were in the nature of a protest and notification of the reservation of the Company's right under Massachusetts laws to contest the constitutionality of the procedure even after proceeding under the statute, to determine the compensation.]

On the same day — August 15, 1895 — the Company filed the "specification and description" required by the act (Gl. R. 10, 11), which instrument contained the following: —

> "*Item 40. The rights, privileges and easements acquired by said company under said chapter 167* of the Acts of the Legislature of Massachusetts for the Year 1881, and now in use by it, of laying and maintaining water pipes and mains in said streets, and of making connections therewith, for the purpose of supplying said city and the inhabitants thereof with water, and all property, property rights, privileges, easements, waters, and water-rights of said company, *and all the*

rights and franchises of said company whether *for supplying water* to the city of Gloucester and the inhabitants thereof *and of collecting water rates* therefor or otherwise.

"Hereby intending to specify and describe all the corporate property, and all the rights, privileges, easements, lands, waters, water-rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all appliances owned by said company and used in supplying said city and the inhabitants thereof with water." (Gl. R. 76.)

The City subsequently, September 5, 1895, refused to admit the correctness of the description of the property filed by the City (which thus expressly included the above franchise rights and privileges), and so notified the Company of its refusal (Gl. R. 89); and on September 24 voted to purchase the property of the Water Company under and in accordance with the provisions of section 16, chapter 451, of the acts of 1895 (Gl. R. 11, 90); and on October 1, 1895, took possession of and has since continued to possess and use the same for the benefit of the City. (Gl. R. 11.)

Proceedings before Commissioners and in the State Court.

After the parties had tried and failed to agree upon the value of the property, plaintiff petitioned the Supreme Judicial Court to appoint three commissioners to determine the fair value of said property. The court appointed these September 24, 1897. (Gl. R. 11.)

The commissioners heard the parties; and on or about June 29, 1900, reported to the court, *inter alia*, that property consisting of three rights belonging to said Company was not valued; viz., —

"1. The franchise right to take additional sources of supply in ward 8 in said city;

"2. The franchise right to lay and maintain pipes in the streets of said city;

"3. The franchise right to charge water rates for water supplied to said city and its inhabitants.

"That the value of said three rights is, in fact, covered by and included in the value and amount of the earnings and income of the plaintiff company."

Gl. R. 11, 12.

The commissioners also reported: —

"In valuing the property, we have followed the rule adopted by the Court in the Newburyport case, 168 Mass., 341." (Gl. R. 12.)

The report also included the following: —

"In approaching a valuation by this method, *we have not considered the past, present or prospective income, good will, or the franchise rights.* We have arrived at this conclusion on account of the phrase in section 16, chapter 451, Acts of 1895, that such value shall be estimated without enhancement on account of future earning capacity or future good will, or on account of the franchise of said company, and do not think that in the construction thereof the word 'future' qualifies this conclusion. *We have treated it as property which the company can no longer use*, but the city can, and is to pay a fair value for upon these conditions.

"*If*, however, the fact of the income which the company was receiving at the transfer is an element that can, under this statute, be considered as bearing upon the question of a fair valuation, this award, as we respectfully submit, *ought to be reformed, and*

the question of valuation be reconsidered." (Gl. R. 13, 14.)

The report also contained the following: —

"2. The city of Gloucester having purchased the property as and for a water plant in its entirety, and as that is the use to which it is best adapted, we have valued the same as such, and in doing so *have not involved the exercise of any public franchise or franchise right*, nor what it was worth to the city or to the petitioner, but what it was fairly worth, having regard to all the facts." (Gl. R. 16.)

The Company's Contract to furnish the City Water for Fire Purposes was valued under Peculiar Circumstances.

The City claimed before the commissioners that the contract subsisting October 1, 1895, between the City and the Company, — being said contract No. 2, — was not, under the act of 1895, to be included in the valuation and award under the act; *nevertheless the City, by its counsel, suggested to the commissioners that that contract be valued by the commissioners, and accordingly it was so valued.* The valuation did not, however, appear separately, but was included in the commissioners' final award. (Gl. R. 16.)

Both parties objected to the commissioners' report; the report and award were not passed upon by the single justice, but were reserved by him for consideration of the full court. (Gl. R. 16.)

The report and award and the motions and questions thereon were later argued before and considered by the full court, which, June 19, 1901, by LORING, J., rendered a decision and opinion confirming the commissioners' report in the exclusion from valuation of the rights and earn-

ings and income of plaintiff Company. (Gl. R.16, 17.) A copy of the opinion appears in Gl. R. 79.

After the decision of the full bench of the state court, and before decree, the plaintiff Company brought the present bill in the Circuit Court, alleging, *inter alia*, that the act of 1895 threatened the Company with municipal competition and consequent ruin unless it would sell its property, apparently voluntarily, to the City upon the terms of said act as construed and applied by the commissioners (Bill, par. 17, Gl. R. 11–16), and by said full court (Bill, par. 18, Gl. R. 16, 17), and that such *sale was influenced and compelled by said threat and was compulsory in fact and in law*. (Bill, par. 19, Gl. R. 17.)

Questions presented by Plaintiff's Bill and the Demurrer thereto.

The questions raised in the Circuit Court in the Gloucester case are clearly shown from the allegations and prayers in the bill, wherein plaintiff avers and claims, —

(*a*) That the act of 1895 (c. 451) is in violation of the obligation of the contract clause of section 10 of article I. of the Constitution of the United States.

(*b*) That by said act, as construed by the state court, the state of Massachusetts deprives plaintiff of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

(*c*) That, similarly, the state of Massachusetts denies to plaintiff the equal protection of the laws in violation of said Fourteenth Amendment. (Gl. R. 17.)

And plaintiff further avers, —

(*a*) That said act was novel; that the only act at all resembling it in the terms of the so-called "sale" was the Massachusetts act of 1894 (c. 474), the effect and constitutionality of which are still in litigation.

(*b*) That it is the policy and practice of the federal courts not to pass upon the constitutionality of statutes while there remains an opportunity for the adoption of such construction of the statute involved as would avoid the point or points upon which such constitutionality is questioned.

(*c*) That it was open to the full court of Massachusetts to hold, as claimed before it by the Company, that the Company was entitled, under the act, to compensation from the City for all its property, except its franchise to be a corporation, and thereby to obviate all questions of constitutionality raised by this bill.

(*d*) That it was not open to the plaintiff Company to contend before the commissioners nor before the state court that the act was unconstitutional.

(*e*) That by proceeding before said commissioners and the state court, plaintiff did not waive its right to contend, in the proper court or courts, that the act violated plaintiff's constitutional rights; but, on the contrary, plaintiff has always claimed that if the act should be construed and applied as it has been by said commissioners and by said state court, the act is unconstitutional and void.

(*f*) That no decree or judgment has yet been entered upon the award by the commissioners; and no payment thereunder has been made or tendered to plaintiff. (Gl. R. 17, 18.)

In consequence of which plaintiff prays, —

1st. That chapter 451 of the acts of 1895, as construed by said full court, be adjudged unconstitutional, and in violation of plaintiff's rights under the Constitution of the United States.

2d. That it be decreed that the defendant has taken and held the property described in Exhibit M (Gl. R. 54) in violation of rights secured to plaintiff by the Constitution of the United States.

3d. For general relief. (Gl. R. 18.)

To this bill the defendant demurred. (Gl. R. 87.)

The Circuit Court sustained the demurrer in a "Rescript" by COLT, J., saying, —

> "This case, in our opinion, is governed by the case of the *Newburyport Water Company* v. *City of Newburyport*, and the demurrer to the bill is therefore sustained." (Gl. R. 89.)

Thereupon a final decree was entered, dismissing plaintiff's bill (Gl. R. 92, 114), and plaintiff appealed directly to the present court. (Gl. R. 114.)

As the Circuit Court held that the Gloucester case was governed by the Newburyport case (Gl. R. 89), and thereupon dismissed plaintiff's bill, it follows that the later case also was determined upon the one crucial point upon which our constitutional claims in the earlier case were decided against us.

And as the present case was held governed by the Newburyport case, the opinions of the Circuit Court in the Newburyport case are placed in the record of the Gloucester case.

For opinion on demurrer, see Gl. R. 93 (85 Fed. Rep. 723); on claim under Fourteenth Amendment, Gl. R. 98 (103 Fed. Rep. 584); and on claim as to violation of the obligation of contracts, Gl. R. 113 (113 Fed. Rep. 677).

The Questions herein Presented.

Examination of the pleadings, and of the said opinions and rescript of the Circuit Court, and of the decree thereon, all as they appear in the transcript of record, will show that the following questions are involved in this case, and that they arise upon the appeal from the final decree of the Circuit Court: —

First. Was the plaintiff deprived of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States?

Second. Did the plaintiff fail to establish a taking of its property without just compensation, under the authority of the state?

Third. Was the sale of the plaintiff's property compulsory in law as well as in fact?

Fourth. Did the Circuit Court err in that it did not hold that the act of 1895, being chapter 451 of the Massachusetts acts of 1895, was compulsory in law as well as in fact, and constituted duress?

Fifth. Did the Circuit Court err in holding in effect that the threatened grant to the defendant, the City of Gloucester, of a competing franchise under said act of 1895 (c. 451), was a lawful exercise of legislative power?

Sixth. Did the said act of 1895 (c. 451), as construed by the highest court of Massachusetts, authorize a taking of plaintiff's property without just compensation; and did the state or commonwealth of Massachusetts thereby deprive plaintiff of its property without just compensation in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States?

Seventh. Did the Circuit Court err in that it held in effect that the obligation of no contract of the plaintiff has been impaired in violation of the contract clause of the Constitution of the United States, to wit, section 10 of article I. of the Constitution of the United States?

Eighth. Did the Circuit Court err in that it did not hold that said act of 1895 impaired and impairs the obligation of plaintiff's contracts with the defendant, and thereby violates section 10 of article I. of the Constitution of the United States, and plaintiff's rights thereunder?

Ninth. Did the Circuit Court err in that it held in effect that by said act of 1895, as construed and applied by the

highest court in Massachusetts, the state or commonwealth of Massachusetts did not deny to plaintiff the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, and of plaintiff's rights thereunder?

Tenth. Did the Circuit Court err in holding that this case is governed by the case of the *Newburyport Water Company* v. *The City of Newburyport?*

Eleventh. Did the Circuit Court err in sustaining defendant's demurrer, and decreeing thereupon that plaintiff's bill be dismissed?

It would seem that the above questions may be condensed into the following: —

FIRST.

Was the plaintiff deprived of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States?

It will appear that the principal question involved in the above is —

A. *Was the property of the plaintiff, or any part of it, (1) taken under the authority of the state of Massachusetts (2) without just compensation?*

and it will appear that the crucial question involved in A *is —*

(a) *Was the sale of the plaintiff's property compulsory in law as well as in fact?*

SECOND.

Did the Circuit Court err in that it held in effect that the obligation of no contract of the plaintiff has been impaired in violation of the contract clause of the Constitution of the United States, to wit, section 10 of article I. of the Constitution of the United States?

THIRD.

Did the Circuit Court err in that it ordered, adjudged, and decreed that plaintiff's bill be dismissed with costs to the defendant?

Specification of Errors.

(*Gloucester Case.*)

The errors assigned are as follows: —

"*Assignment of Errors.* (Gl. R. 115, 116.)

I. The court erred in this: That it held that the plaintiff has not been deprived of its property without due process of law in violation of the fourteenth amendment to the Constitution of the United States.

II. The court erred in this: That it held that the plaintiff failed to establish a taking of its property without just compensation under the authority of the State.

III. The court erred in this: That, although it held that the sale of the company's property was compulsory in fact, it held that such sale was not compulsory in law.

IV. The court erred in this: That it did not hold that the act of 1895, being chapter 451 of the Massachusetts Acts of 1895, was compulsory in law as well as in fact, and constituted duress.

V. The court erred in this: That it held, in effect, that the threatened grant to the defendant, The City of Gloucester, of a competing franchise under said act of 1895 (being chapter 451 of Massachusetts Acts of 1895) was a lawful exercise of legislative power.

VI. The court erred in this: That it did not hold that by said act of 1895, (chapter 451 of Massachusetts Acts of 1895), as construed and applied as alleged in plaintiff's bill in this suit, the State or

Commonwealth of Massachusetts deprived and deprives plaintiff of its property without due process of law, in violation of the fourteenth amendment to the Constitution of the United States and of plaintiff's rights thereunder.

VII. The court erred in this: That it held, in effect, that the obligation of no contract of the plaintiff has been impaired in violation of the contract clause of the Constitution of the United States, to wit, section 10 of article I of the Constitution of the United States.

VIII. The court erred in this: That it did not hold that said act of 1895 (being chapter 451 of Massachusetts Acts of 1895), impaired and impairs the obligation of plaintiff's contracts with defendant, The City of Gloucester, alleged in plaintiff's bill in this suit, (including plaintiff's franchises), and thereby violates section 10 of article I of the Constitution of the United States and plaintiff's rights thereunder.

IX. The court erred in this: That it held in effect that, by said act of 1895, (being chapter 451 of Massachusetts Acts of 1895), as construed and applied as alleged in plaintiff's bill in this suit, the State or Commonwealth of Massachusetts did not and does not deny to plaintiff the equal protection of the laws in violation of the fourteenth amendment to the Constitution of the United States and of plaintiff's rights thereunder.

X. The court erred in this: That it did not hold that, by said act of 1895 (being chapter 451 of Massachusetts Acts of 1895), as construed and applied as alleged in plaintiff's bill in this suit, the State or Commonwealth of Massachusetts denied and denies to plaintiff the equal protection of the laws, in violation of the fourteenth amendment to the Constitution of the United States and of plaintiff's rights thereunder.

XI. The court erred in this: That it held as follows: 'This case, in our opinion, is governed by the case of The Newburyport Water Company *vs.* City of Newburyport.'

XII. The court erred in this: That it sustained the defendant's demurrer to plaintiff's bill.

XIII. The court erred in this: That it ordered, adjudged and decreed that the plaintiff's bill be dismissed, with costs to the defendant to be taxed by the clerk.

XIV. The court erred in this: That it did not overrule the defendant's demurrer."

The Newburyport Case.

Argument.

Jurisdiction.

The defendant's first pleading in the case was a motion to dismiss plaintiff's bill for *want of jurisdiction*. (R. 95, 96.)

The defendant next demurred; and its first alleged ground of demurrer was that the bill did not show that the Circuit Court had jurisdiction to entertain the same, etc. (R. 57, 58.)

The demurrer was overruled, and the Circuit Court continued its jurisdiction.

Possibly the defendant will again claim and argue here that the Circuit Court had no jurisdiction. Moreover, it is within the province and practice of the court to raise the question of jurisdiction *sua sponte*.

The Circuit Court had Jurisdiction.

The jurisdiction of the Circuit Court is to be determined wholly upon plaintiff's own allegations, and is not limited by defendant's denials, nor does it depend upon the result of the trial of any issues presented by the pleadings of both parties.

> "It is, however, sufficient if a Federal question forms an ingredient of the original cause, although other questions of law or fact may be involved. *Railroad Co.* v. *Miss.*, 102 U.S. 141. The question whether a party claims a right under such Constitution and laws *is to be ascertained from the legal construction of his own allegations*, and not by the effect attributed to those allegations by the adverse party. *N.J. R. Co.* v. *Mills*, 113 U.S. 257. The *jurisdic-*

tion of the circuit court under St. 1875, § 1, *cannot be ousted by the character of the defence, and is not limited by the denials in the defendant's answer.* Even if such answer puts in issue only non-Federal questions, the jurisdiction of the Federal court is not ousted if a Federal question formed an ingredient of the original cause. *Sawyer* v. *Concordia*, 12 F.R. 754, relying on *Mayor* v. *Cooper*, 6 Wall. 253; *Gold Washing Co.* v. *Keyes*, 96 U.S. 203."

1 Notes on Revised Statutes of the United States, Gould & Tucker, p. 101.
See also *Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. 1, at page 11.

We further submit that the jurisdiction of the Circuit Court is fully established under the following cases: —

City Railway Co. v. *Citizens Railway Co.*, 166 U.S. 557, at 562, 563.
Vicksburg Water Works Co. v. *Vicksburg*, 185 U.S. 65, 83.

We show, however, in detail below, the essentials of the Circuit Court's jurisdiction of the present suit, as these are required by law and fulfilled in fact.

Essentials of the Circuit Court's Jurisdiction of the Present Suit.

The essentials of jurisdiction in the present suit are laid down by Congress, under the Constitution, as follows: —

"That the Circuit Courts of the United States shall have original cognizance . . . of all suits of a civil nature, . . . in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or

> value of $2,000, and arising under the Constitution . . . of the United States."
>
> Act of Congress of August 13, 1888, c. 866, Supplement to U.S. Rev. Sts. p. 611.

These are all the affirmative requirements to confer jurisdiction.

The essentials, therefore, are as follows: —

1. A suit of a civil nature in equity.

2. Where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2000.

3. And where the suit arises under the Constitution of the United States.

Paragraph 16 of the bill is as follows: —

> "16. Your orator further shows that this is a suit of a civil nature in equity; that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, and arises under the Constitution of the United States." (R. 16.)

The jurisdictional facts here broadly alleged are shown specifically in the bill in detail.

1. *That the suit is a civil suit in equity is shown as follows:* —

(*a*) That it is commenced by "Bill of Complaint . . . in equity." See caption of bill.

(*b*) That this caption is justified by the contents of the bill.

The bill alleges that though the City holds the property described in the bill by what appears to be a voluntary sale, yet that the sale was not voluntary, but compulsory; that the defendant holds the property not by the voluntary sale, but by a *taking* under unconstitutional legislation,

and seeks, *inter alia*, to have the deed cancelled and the property restored, and also an injunction to prevent the defendant from alienating or encumbering the property, etc.

In —

Moore v. *Sanford*, 151 Mass. 285, —

the court took jurisdiction of a bill in equity to set aside the taking of land by commissioners under the authority of a Massachusetts statute, upon the ground that such statute was unconstitutional.

See also *Chicago &c.* v. *Minnesota*, 134 U.S. 418, 459, 460.

In so far as compulsion or duress entitles plaintiff to avoid the deed, our suit is also properly a suit in equity.

In —

Brown v. *Pierce*, 7 Wall. 205; and —
Baker v. *Morton*, 12 Wall. 150, —

bills in equity were filed and sustained to set aside deeds obtained by compulsion or duress.

For general principles sustaining the claim that the present suit is properly an equity case, see also —

Story's Equity Jurisprudence (13th ed.) vol. 1, sec. 239.
Ibid, sec. 700.

2. *The matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.*

This is alleged in the bill and sworn to. It is further shown in the bill that the property in dispute is of the value of "more than $475,000." (Bill, end of paragraph 14. R. 16.)

We further show (*ante*, p. 36) that the jurisdiction of the Circuit Court is to be determined wholly upon plaintiff's own allegations, and is not limited by defendant's

denials, nor does it depend upon the result of the trial of any issues presented by the pleadings of both parties.

While it is sufficient that the jurisdictional amount appear from the plaintiff's bill, yet if it were omitted there it might be shown *aliunde*. It might even "appear by affidavit after the appeal is taken" to the Supreme Court, or otherwise to the satisfaction of the court.

United States v. *Freight Association*, 166 U.S. 290, at page 310.

Whiteside v. *Haselton*, 110 U.S. 296, paragraph 1 of headnote.

3. *The suit arises under the Constitution of the United States.*

The bill, both originally and as amended, alleged that plaintiff's rights under the federal Constitution were violated.

See plaintiff's bill, (par. 14, R. 14–16); also prayer of bill (R. 16, 17), and amendment to bill. (R. 56, 57.)

Further, the decree shows that the Circuit Court specifically passed upon the constitutional claims involved, the decree being as follows: —

"*Final Decree.*

March 5, 1902.

COLT and BROWN, JJ.:

This cause came on to be further heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it is adjudged and decreed that the plaintiff has not been deprived of its property without due process of law in violation of the fourteenth amendment, and that the obligation of no contract of the plaintiff has been impaired in violation of

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the contract clause, of the Constitution of the United States; and it is thereupon further ordered, adjudged and decreed that the plaintiff's bill be dismissed, with costs to the defendant to be taxed by the clerk." (R. 107.)

Wherefore we submit we have shown that the case presents all the essentials required to give the Circuit Court jurisdiction thereof.

As the suit is one arising under the Constitution of the United States, the fact that both complainant and defendant are Massachusetts corporations is immaterial to the jurisdiction of the court.

The essentials remain as above stated; and jurisdiction depends upon the allegations of the bill, and not upon defendant's answer, nor upon the facts as they subsequently turn out.

In —

City Railway Co. v. *Citizens Ry. Co.*, 166 U.S. 557, the court held as follows: —

At pages 562, 563: "1. There can be no doubt that the Circuit Court had jurisdiction of the case, notwithstanding the fact that both parties are corporations and citizens of the State of Indiana. It should be borne in mind in this connection that jurisdiction depended upon the allegations of the bill, and not upon the facts as they subsequently turned out to be. The gravamen of the bill is that, under the act of the General Assembly of 1861, and the ordinances of January 18, 1864, and April 7, 1880, the Citizens' Railroad Company had become vested with certain exclusive rights to operate a street railway in the city of Indianapolis, either in perpetuity or for the term of

thirty years or thirty-seven years, which the city had attempted to impair by entering into a contract with the City Railway Company to lay and operate a railway upon the same streets.

"All that is necessary to establish the jurisdiction of the court is to show that the complainant *had*, or *claimed in good faith to have, a contract* with the city, which *the latter had attempted to impair*."

This was brought on appeal from the Circuit Court of the United States for the District of Indiana. (Ibid. p. 557.)

The following principles were involved in the above: —

(*a*) Although both plaintiff and defendant were corporations and citizens of the same state (Indiana) the United States Circuit Court had jurisdiction of the parties on the ground that the bill alleged that the complainant had a contract or right which the city of Indianapolis had attempted to impair *under a legislative grant* that the city was one of the "agencies" of the state; that any such attempt by the city under a legislative grant was an act of the state against which the prohibition of the federal constitution is directed; that jurisdiction depended on the allegation of the violation of the constitutional right, "and not upon the facts as they subsequently turned out to be."

It was only necessary to show that the complainant had, or claimed in good faith to have, a contract, and alleged that there was an attempt to impair it, which was unconstitutional.

The suit was a "Bill in Equity" (Ibid. p. 558) to enjoin the defendant from performing alleged unconstitutional acts, "and for the establishment of complainant's rights and the quieting of its title in that connection." (Ibid. p. 558.)

We also quote as follows from the same case: —

"Whether the State had or had not impaired the obligation of this contract was not a question which could be properly passed upon, on a motion to dis-

miss, so long as the complainant claimed in *its bill that it had that effect*, and such claim was apparently made in good faith, and was not a frivolous one." (*New Orleans* v. *New Orleans Water Co.*, 142 U.S. 79, 88.)

Ibid. p. 564.

That the plaintiff's constitutional claims are not frivolous is obvious, we submit, upon an inspection of the record; and is also further established by the following facts: —

After a three days' hearing of counsel in argument upon the demurrer, a Circuit Court judge overruled the demurrer.

Afterwards he decided, in his discretion as to the order of procedure, to limit the next step to the determination of the question whether the Fourteenth Amendment had been violated in the present case. This question was heard not by one judge, but by *two* — thus indicating clearly the doubt, difficulty, and importance which the single judge who had heard the demurrer felt to be involved in the case.

We think that all other questions relating to jurisdiction which were raised in the earlier stages by the defendant are arguments not against the jurisdiction, but upon the questions involved after the court properly obtains jurisdiction.

That the Circuit Court had jurisdiction of the bill upon the constitutional question arising under the allegation of the impairment of the obligation of plaintiff's contract (R. 15, 56) is established by the decision and opinion in —

Vicksburg Water Works Co. v. *Vicksburg*, 185 U.S. 65, 83, and cases cited therein.

See also *Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. 1, 7.

Connolly v. *Union Sewer Pipe Co.*, 184 U.S. 540, 544, 545.

Wherefore we submit that the Circuit Court had jurisdiction.

The Appeal was Properly made Directly from the Circuit Court to the Supreme Court.

We submit that the present case is, as to the essentials of jurisdiction in both the Circuit and the Supreme Court, on all-fours with the case of —

Walla Walla v. *Walla Walla Water Co.*, 172 U.S. 1.

The following is from the statement of facts on page 6:

> "A demurrer to the bill having been overruled, and a preliminary injunction having been granted pursuant to the prayer of the bill, the case subsequently went to a hearing upon the pleadings and proofs, and resulted in a decree perpetuating the injunction. From this decree defendants appealed directly to this court, pursuant to section 5 of the Circuit Court of Appeals act, *allowing such appeal in any case that involves the construction or application of the Constitution of the United States.*"

The Supreme Court not only confirmed the jurisdiction of the Circuit Court, but also took jurisdiction of the appeal.

See also —

American Sugar Refining Co. v. *New Orleans*, 181 U.S. 277.

Connolly v. *Union Sewer Pipe Co.*, 184 U.S. 540, 544, 545.

The Appeal was seasonably Taken and Entered.

Allen v. *Southern Pacific R.R. Co.*, 173 U.S. 479:

From headnote: "The sixth section of the act of March 3, 1891, c. 517, did not change the limit of

two years as regards cases which could be taken from Circuit and District Courts of the United States to this court." . . .

See also —

Holt v. *Indiana Mfg. Co.*, 176 U.S. 68:

This was an appeal from the Circuit Court of the United States to the Supreme Court.

The following is from the opinion: —

At pages 70, 71: "The decree of the Circuit Court was entered in March, 1896, and the appeal to this court was not taken until somewhat over one year and six months, though within two years, thereafter. In January, 1898, a motion to dismiss was made on the ground that section 1008 of the Revised Statutes, giving two years for the bringing of a writ of error, or the taking of an appeal, to review the judgments or decrees of the Circuit or District Courts, was repealed by the Judiciary Act of March 3, 1891. We did not concur in that view, and the motion was denied, though without an opinion. But in *Allen* v. *Southern Pacific Railroad Company*, 173 U.S. 479, the reasons will be found for our conclusion that *the limit of two years remained* unchanged."

See also —

Excelsior &c. Co. v. *Pacific Bridge Co.*, 185 U.S. at page 285:

"The case, being thus in proper condition for appeal, such appeal could be taken at any time within two years. *Allen* v. *Southern Pacific Railroad*, 173 U.S. 479; *Holt* v. *Indiana Manfg. Co.*, 176 U.S. 68."

The record shows the following facts relating to time of taking and entering appeal: —

The final decree, dismissing plaintiff's bill, was made and entered March 5, 1902. (R. 107, 131.)

The appeal was allowed and the bond approved and filed December 8, 1902. (R. 131.)

The assignment of errors was filed December 8, 1902. (R. 131.)

The appeal was entered and docketed in the Supreme Court of the United States January 2, 1903.

As the appeal was taken, entered, and docketed within two years from the date of the final decree in the Circuit Court, we submit that *the appeal was seasonably taken and entered.*

Concerning Special Grounds Alleged by Defendant as Barring Plaintiff's Right to be Heard on the Merits.*

Defendant's demurrer contained the following: —

> "*Second.* . . . that it appears by the bill that the complainant thereby seeks to undo and reverse in a court of equity what has been properly done within its jurisdiction by a court of law." (R. 58.)

. . . . . .

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* All the questions so raised were decided by the Circuit Court in favor of plaintiff. As the defendant has filed no assignments of error we claim that we are entitled to have the decision of the Circuit Court upon these points in our favor affirmed without argument. As, however, we are unable to find decisive anthority upon this point, and we may therefore be mistaken in this claim, we beg to make the claim as a claim of right, and to offer the following argument upon these preliminary defences *de bene*, to be used in case the court should deny our said claim that we are entitled to have the decision of the Circuit Court upon these points in our favor affirmed without argument.

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"*Sixth.* That it appears by the bill that each and every Federal question thereby sought to be raised, or relied on as a ground of jurisdiction in this court, might have been raised by the complainant in the proceedings in the State court of Massachusetts set out in the bill, and properly reviewed by the judiciary of the United States in such proceedings, or might have been raised in this court, if at all, before trial of its case in the State court; and that by omitting then or there to raise any such question, and by its laches in the premises, the complainant is debarred and estopped from maintaining the present bill." (R. 58, 59.)

The questions above presented were fully argued in the hearing upon demurrer, and were disposed of in the opinion of the court thereon as follows: —

"The defendant demurs to the bill for want of jurisdiction, want of equity and on other grounds.

"*It is contended that on the face of the bill this is an attempt to review and retry here a case between the same parties already tried and determined in the State court.*

"*The answer to this is that the constitutional questions set out in this bill were not raised in the State court and could not have been drawn in question in that suit.*

"*Moore* v. *Sanford*, 151 Mass. 285.
"*Pitkin* v. *Springfield*, 112 Mass. 509.

"In *Moore* v. *Sanford*, the plaintiffs, in 1885, filed a petition under the statute for damages sustained by the taking of their lands, and in 1889 brought a bill in equity to test the constitutionality of the statute, and to set aside the taking as unconstitutional. In holding that the plaintiffs had a right, by an independent pro-

ceeding, to dispute the validity of the taking and the constitutionality of the act, the court said:

"'The plaintiffs were entitled to have the question of the constitutionality of the statute determined, and under their petition for damages they were, by necessary inference, compelled in that proceeding to admit that it was constitutional.'

"If the question of the constitutionality of the act of 1894 was not open to the complainant in the proceeding in the State court, the objection that the complainant should have raised the question in that suit falls to the ground, and constitutes no defence to the present bill.

"*Nor do we think that the complainant is chargeable with such laches as to bar its right to bring this bill.*

"*The bill was brought before the suit in the State court was finally determined, and before the acceptance by the complainant of the award.*

"*Moore* v. *Sanford, ubi supra.*" (R. 111.)

The court thereupon proceeded to consider the main question, and held, as stated in the headnote to the report of this case (85 Fed. Rep. 723), as follows: —

"A state statute, under which a water company is in effect compelled to convey its property to the city, under threat of municipal competition, and which in such case allows nothing for its franchise rights, or on account of its future earning capacity or good will, takes its property without due process of law, because without just compensation."

And thereupon the demurrer was overruled. (R. 113.)

The court had previously considered the same preliminary objections to jurisdiction upon the plaintiff's motion to dismiss, and had overruled the motion. (R. 96.)

These questions were presented to the court for the *third* time in and under defendant's petition for rehearing on demurrer. (R. 97.)

Under this petition they were again fully argued in briefs submitted by both parties.

The petition was filed April 14, 1898.

Plaintiff's brief was filed June 27, 1898, and on November 17, 1898, the petition for rehearing was denied. (R. 130.)

When, later, the constitutional question was argued, the same questions were presented for the *fourth* time, and with fulness and force; but the Circuit Court on that occasion, having already decided them three times, took no further notice of them, and by implication affirmed the decision and opinion already cited and quoted above.

We claim and submit that these questions were correctly decided as above by the Circuit Court against the defendant's claims and contentions.

As to defendant's claim that complainant, by its bill, seeks to undo and reverse what was done in the state court.

We submit that the above quotation from the opinion of the Circuit Court, and the authorities therein cited, are sufficient and conclusive to the point that the present case is *not* the same case as the case in the state court; that the constitutional questions could *not* have been presented in that case; and that *for that very reason, under the law and practice of Massachusetts, the plaintiff had a right to test in a different and independent proceeding, the constitutionality of the legislation involved, and that this could be done before the final determination of the proceeding under the statute and before the acceptance by the plaintiff of the award thereunder.*

And as the present bill was so brought, it was properly held that the Circuit Court had jurisdiction.

We may add that the case of *Moore* v. *Sanford*, 151 Mass. 285, has been adopted and followed in Massachusetts upon the points involved herein in —

Norcross v. *Cambridge*, 166 Mass. 508, at page 510.

As to defendant's claim that the plaintiff, by electing to proceed and proceeding before the commissioners and in the state court under the act of 1894, waived its right to question the constitutionality of the statute.

Undoubtedly there is abundant authority for the general proposition that one who claims that his constitutional rights are violated by a statute may be held to have waived those rights by doing various acts inconsistent with such claim.

But it is distinctly held to be law by the highest court of Massachusetts that such acts as plaintiff has done herein do NOT constitute such waiver. It is so held both in the case of —

Moore v. *Sanford*, 151 Mass. 285, —

above cited by the Circuit Court, and in the later case of —

Norcross v. *Cambridge*, 166 Mass. 508, at page 510.

Obviously, under those two cases the state court would have taken jurisdiction of the present bill if it had been brought there; and it is settled by the decisions of the present court that —

Where the federal and state courts have concurrent jurisdiction (1) a party litigant loses no rights by bringing his suit in the federal court; and (2) the federal court will apply to the case "the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper State tribunal of the same locality."

These principles were clearly laid down in —

Ex Parte McNiel, 13 Wall. 238, at page 243, —

where the court said, —

> "This principle may be laid down as axiomatic in our National jurisprudence. A party forfeits nothing by going into a Federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper State tribunal of the same locality."

See also —

Gormley v. *Clark*, 134 U.S. 338, at pages 348, 349, —

as to cases of equitable jurisdiction.

In —

Clement v. *Packer*, 125 U.S. 309, —

as the case involved the ownership of Pennsylvania land, the United States Supreme Court adopted the rule of Pennsylvania *decisions* (not statutes) relating to evidence establishing parties' rights, although that rule conflicted with the rule of the United States Supreme Court, and the case was brought in the United States Circuit Court.

That the Circuit Court was justified in relying upon *Moore* v. *Sanford* (151 Mass. 285) is further shown by the opinion in —

Halstead v. *Butler*, 140 U.S. 273, at pages 276, 277.

As in the present suit the title to real estate is involved, and the parties are both Massachusetts corporations, we submit that *Halstead* v. *Butler* is particularly applicable to the present case.

The jurisdiction of the Circuit Court attached because we claimed that our rights under the federal Constitution were violated. All other questions of fact and law involved are incidental to this.*

And, the jurisdiction having attached, we are entitled, as shown above, to the full benefit of the rules in *Moore* v. *Sanford*, more especially as, under the Massachusetts rule, we were *excluded* from questioning in the state court the constitutionality under our petition, and therefore, *we could not possibly have gone from the Supreme Court of Massachusetts to the United States Supreme Court.*

As, therefore, it is held in the Massachusetts cases above cited that such acts as plaintiff has done herein do *not* constitute a waiver of the plaintiff's right to proceed in another and independent proceeding to question the constitutionality of the statute, and as, under the decisions of the present court, we lose nothing by bringing suit in the federal court instead of the state court, and are entitled to have applied here the rule of the state court upon the point involved, — it follows that the plaintiff, by proceeding before the commissioners and in the state court under the act of 1894, did *not* waive its right to question the constitutionality of the statute, as it has done by its present bill in the Circuit Court.

The suit, as brought, is not only within the principles and lines laid down under the above Massachusetts decisions, but is within the limits approved by the present court in —

Chicago &c. Ry. Co. v. *Minnesota*, 134 U.S. 418, 459, 460.

Defendant cited against us in the Circuit Court —

Electric Company v. *Dow*, 166 U.S. 489, —

affirming that it "is conclusive and is enough on this point."

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* *Osborn* v. *United States Bank*, 9 Wheat. at star pages 821, 822, 823.

An examination of that case shows that it *is* "conclusive and enough" on a *different* point, to wit, that if the Water Company had relied upon a constitutional (a federal) point *in its proceeding under the statute in the state court*, and if the state court (following *Pitkin* v. *Springfield*, 112 Mass. 509) had held that, by invoking the statute in a court proceeding, the Water Company admitted the validity of the statute, the Supreme Court of the United States *would have followed* the decision of the state court, and *would have held* the Water Company estopped from denying the constitutionality of the statute.

But one ground of respondent's complaint against the complainant is that *complainant did* NOT *raise the question of constitutionality in the state court;* and therefore the conclusion which would have followed from *Electric Co.* v. *Dow*, *if* plaintiff had raised the question of constitutionality in the state court, does not apply.

We base our position on the Massachusetts decision of *Moore* v. *Sanford*, 151 Mass. 285 (affirmed in *Norcross* v. *Cambridge*, 166 Mass. at page 510), which, in part, is based upon *Pitkin* v. *Springfield*, and is supported in principle in the federal decisions shown *ante*, p. 51.

The case of *Electric Co.* v. *Dow*, 166 U.S. 489, only strengthens, we submit, our position.

We submit that in *Electric Co.* v. *Dow* the present court only followed the above rule as to adopting and applying the law of the state.

Applying this rule, we submit it is clear that under *Moore* v. *Sanford*, 151 Mass. 285, plaintiff was not estopped to try, in a different suit brought after it had invoked the statute of 1894, the constitutionality of that statute; and that under *Electric Co.* v. *Dow it is equally clear that the federal courts will follow the Massachusetts rule in this respect.*

As to defendant's claim that plaintiff is estopped by its deed, and that the plaintiff, by making the sale and deed

under the statute, waived its right to question the constitutionality of the statute.

Of course we do not dispute the general principle of estoppel by deed; but we submit that it does not prevent the grantor from showing that a deed which appears on its face to be voluntary was in law and in fact compulsory, and therefore obtained by duress, and that the grantor is entitled to the application of the law arising from establishing that the deed was obtained by duress.

See Bigelow on Estoppel (5th ed.) p. 583.

As to defendant's claim that plaintiff waived any rights or is estopped by the fact that the City, after receiving the deed and before the filing of plaintiff's bill, expended not less than $45,000 on the property. (R. 90 (*f*).)

It is to be noted that the stipulation in connection with the above also states that the City, from the date of the transfer, "received the revenues from the property on the basis of the old rates."

That such expenditure should not be treated as ground of waiver and estoppel, is, we submit, established in —

Allore v. *Jewell*, 94 U.S. 506, at pages 512, 513:

. . . "The improvements made have not cost more than the amount which a reasonable rent of the property would have produced, and the complainant, as we understand, does not object *to allow the defendant credit for them*. And as to the small amount paid on the execution of the conveyance, it is sufficient to observe, that the complainant received from the administrator of the deceased's estate only $113.42; and there is no evidence that he ever knew that this sum constituted any portion of the money obtained from the defendant. A decree must, therefore, be entered for a

cancellation of the deed of the deceased and a surrender of the property to the complainant, but without any accounting for back rents, the improvements being taken as an equivalent for them."

See also—

Cheney v. *Gleason*, 125 Mass. 166, at page 177.

These cases show that, instead of treating such expenditures as a basis of waiver or estoppel, they may be set off against the income received and which must be accounted for, or the court may impose any other equitable terms upon which the plaintiff can retake the property.

The cases there cited go to the extent of holding that where there is duress there is no estoppel, even though the party performing the act under duress did it with the full intention that it should be acted upon.

If we establish, as we claim, that the sale was compulsory in law as well as in fact, it will follow that such sale necessarily involved the making of the deed by which it was to be effected; and this court has already held that whatever is involved in the act required by the compulsion, is treated as part of that which is compulsory.

Swift Co. v. *United States*, 111 U.S. 22, at page 28.

Robertson v. *Frank Bros. Co.*, 132 U.S. 17, at page 24.

See also *post*, p. 73.

Indeed, we think it will be conceded by the defendant that the doctrine of estoppel by the sale or by the deed cannot apply if we show that the sale is compulsory in law; and we rely upon showing that the sale was compulsory in law.

As to the claim which defendant may make that the statute of 1894 was solicited and procured by the Water Company.

If such claim be made, we answer, —

If it be claimed that plaintiff is estopped by the fact that it itself petitioned to the legislature for an act which resulted in the act of 1894, we show that the Water Company did *not* petition for any such sale as is prescribed by the act of 1894.

The petition itself is set forth in full in the bill of complaint. (Exhibit F, R. 32.)

That petition contains no such rule of compensation as is found in the act.

The petition asked for the sale of the Company's franchise rights and other property, and left the matter of compensation to be determined as usual; and this, of course, must have resulted in giving to the Water Company compensation for *all* the franchise rights and other property included in the sale.

At the instance of the City the legislature inserted the novel provisions which resulted in taking all our property, with the right, if the statute could give it under the Constitution, to pay for only part of the property.

Moreover, this legislation contained, in effect, the threat that unless we offered our property within thirty days we should be ruined by an authorized competition from the City of Newburyport.

Under no principle of estoppel, then, can we be held responsible for the act of 1894.

We have examined a number of cases where parties were held to be estopped to question the constitutionality of a statute; but in such cases the parties were estopped from denying the constitutionality of what they themselves had petitioned for, etc. We have found no cases, and we know of no principle of law, intimating that a party may be estopped to question the constitutionality of the provisions of an act of the legislature where such provisions *were objected to by him*.

Bigelow on Estoppel (5th ed.) pp. 689, 691, 692, and note 1, p. 691.

We asked the legislature for bread; they gave us a stone. We submit we are not estopped to object to the stone, even if the giving of the stone was the result of our asking for bread.

As to the attempted defence of laches.

Rose's United States Supreme Court Digest, vol. 2, p. 1185, paragraph (*e*): —

"Whether laches are such as will bar relief depends on circumstances of each case.

"*Bryan* v. *Kales*, 134 U.S. 135, 33 L. 829, Bk. XI. U.S. Notes, 923; *Griswold* v. *Hazard*, 141 U.S. 288, 35 L. 678, Bk. XII. U.S. Notes 28; *Abraham* v. *Ordway*, 158 U.S. 420, 39 L. 1036, Bk. XII. U.S. Notes, 753."

We therefore prefer to postpone the consideration of this question until after the argument upon the main questions, which will show the circumstances of the case upon which the question of laches depends.

See *post*, p. 134.

Argument concerning the alleged violation of the Fourteenth Amendment.

The question under the Fourteenth Amendment was and is whether the plaintiff was deprived by the state of its property without due process of law.

First Assignment of Error, R. 131, 132.

Preliminary.

We may resort to the opinions of the court below to show "the grounds upon which the court below proceeded."

Loeb v. *Columbia Township Trustees*, 179 U.S. at page 483.

The Circuit Court held that "THE PLAINTIFF'S WHOLE POSITION HINGES ON THE QUESTION OF COMPULSION" (R. 123); and that the "CRUCIAL POINT" in determining that question was *whether the statutory threat of municipal competition "produced compulsion which amounted to duress."* (R. 123.) Later in the opinion the court said, —

> *"The whole question of compulsion or duress in this case turns upon whether municipal competition, actual or threatened, under the authority of the state, was justified by law."* (R. 124.)

The Circuit Court, after an extended examination of authorities, held (what the plaintiff did not there dispute), that when a franchise was obtained which is not exclusive the legislature has a right to authorize municipal competition. (R. 120.) Having cited and examined numerous authorities to that point, the Circuit Court *then obviously* ASSUMES *that what may be lawfully done may be lawfully threatened*, and, *without citing any authority therefor*, proceeds as follows: —

> "But if competition be lawful, threatened competition is lawful. And if it were lawful for the State to authorize municipal competition, it was not unlawful for it to threaten to authorize municipal competition." (R. 123.)

And, applying this conclusion to the question of compulsion in law, or duress, the Circuit Court held that the sale was not compulsory in law; that therefore there was no *taking;* and hence there was no violation of the Fourteenth Amendment. (R. 127.)

We shall undertake to show, in connection with an examination of the opinion of the Circuit Court, that in its treatment it ignored "the *collateral* question of obtaining a contract by threats," and that if the law relating thereto is

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applied, as settled alike by the Supreme Court of the United States and the Supreme Judicial Court of Massachusetts, the conclusion of the Circuit Court should be held erroneous.

No other point was decided by the Circuit Court against plaintiff's contention. There was, however, one other point which that court finally "assumed," without deciding, in plaintiff's favor; but upon which it showed a tendency to decide against plaintiff, viz., *whether or not the act of 1893 was void because the City voted* NOT *to purchase.*

In all other respects we submit that the opinion of the Circuit Court showed that we fully sustained our claim of alleged violation of plaintiff's rights under the Fourteenth Amendment.

It would seem, therefore, sufficient to show that the Circuit Court was in error in deciding the "crucial point" against plaintiff, and in failing to positively decide in plaintiff's favor the other point, viz., that the act of 1893 was void as claimed.

As, however, it might be held that we are bound to show the error of the court below, not merely in reaching its conclusion, but in the conclusion reached and set forth in its decree; and as the present court might hold that such conclusion was lawful even if the lower court's grounds therefor were erroneous, — we feel bound, out of abundant caution, to argue the entire case, — giving particular attention to what the Circuit Court called the "crucial point." *

I.

"DUE PROCESS OF LAW," UNDER THE FOURTEENTH AMENDMENT, REQUIRES COMPENSATION TO BE MADE OR SECURED TO THE OWNER OF PRIVATE PROPERTY TAKEN UNDER THE AUTHORITY OF THE STATE FOR PUBLIC USE.

* See *post*, pp. 68 *et seq.*

THIS PROVISION CONTROLS A TAKING, WHATEVER MAY BE ITS FORM OR GUISE.

From Article XIV. of Amendments to the Constitution of the United States:

> "Section 1. Nor shall any state deprive any person of . . . property, without due process of law."

Plaintiff's main claim herein is that, as the legislation complained of has been construed by the state court, the state or commonwealth of Massachusetts deprived and deprives the plaintiff company of some of its property without due process of law; that this result is reached by reason of the fact that the sale, though voluntary in form, was compulsory in fact and in law; that the compulsion emanated from the state or commonwealth of Massachusetts, and constituted indirectly, and in effect, a *taking* of plaintiff's property; that thereunder some of the property of the plaintiff was taken without *any* compensation or provision therefor, and that such deprivation or taking of property is a taking "without due process of law."

As the Fourteenth Amendment contains no express language prohibiting the taking of private property for public use without just compensation, it is necessary to show that this provision, which is found in express words in the Fifth Amendment, has been read into the Fourteenth Amendment by the United States Supreme Court.

The case in which this was established is the frequently cited case of —

Chicago &c. R.R. v. *Chicago*, 166 U.S. 226, —

which adopted the conclusion reached by the late Mr. Justice JACKSON, while circuit judge, in —

Scott v. *Toledo*, 36 Fed. Rep. 395, 396, —

as follows: —

"The conclusion of the Court upon this question is, that since the adoption of the Fourteenth Amendment, the compensation for private property taken for public uses constitutes an essential element in 'due process of law,' and that without such compensation the appropriation of private property to public uses, **no matter under what FORM of procedure it is taken,** would violate the provisions of the Federal Constitution."

In *Chicago &c. R.R.* v. *Chicago*, however, what was under examination was a judgment of a state court claimed to be authorized by a *statute*.

The conclusion reached by the Supreme Court is stated as follows: —

"In our opinion, a judgment of a State court, even if it be authorized by *statute*, whereby private property is taken for the State or *under its direction* for public use, without compensation made or secured to the owner, is, upon *principle* and authority, wanting in the *due process of law* required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest Court of the State is a denial by that State of a right secured to the owner by that instrument."

166 U.S. at page 241.

This case has been so often cited and applied, both in the Supreme Court and in the circuit courts, that it can be no longer questioned, and it was accepted and applied by the Circuit Court (R. 113, 114) in the present litigation as establishing the point above claimed; viz., —

"Due process of law" under the Fourteenth Amendment requires compensation to be made or secured to the owner of private property taken for public use.

This provision controls a taking, whatever may be its form or guise.

II.

AS TO WHAT CONSTITUTES A TAKING UNDER THE FOURTEENTH AMENDMENT.

WHATEVER THE PROVISIONS OF THE STATE STATUTE, WE ARE ENTITLED TO GO BEHIND THE FORM AND TO SHOW THAT WHAT WAS AUTHORIZED BY THE STATUTE, AS CONSTRUED BY THE STATE COURT, WAS, IN EFFECT OR IN SUBSTANCE, A TAKING OF PLAINTIFF'S PROPERTY WITHOUT COMPENSATION, UNDER THE FORM OR GUISE OF A SALE WHICH WAS APPARENTLY VOLUNTARY, BUT WHICH WAS IN REALITY COMPULSORY IN FACT AND IN LAW.

We beg to call attention to the following cases, cited with approval by the Supreme Court in the case of —

Chicago &c. R.R. v. *Chicago*, 166 U.S. at pages 238, 239, —

including the quotation in the opinion in *Scott* v. *Toledo*, as follows: —

> "In *Scott* v. *Toledo*, 36 Fed. Rep. 385, 395–396, the late Mr. Justice JACKSON, while Circuit judge, had occasion to consider this question. After full consideration that able judge said: 'Whatever may have been the power of the States on this subject, prior to the adoption of the Fourteenth Amendment [page 139] to the Constitution, it seems clear that, since that amendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the States cannot now lawfully appropriate private property for the public benefit or to public uses without compensation to the owner, and that *any attempt so to do*, whether done in pursuance of a constitutional provision or *legislative* enactment, whether done by the Legislature itself or *under delegated authority by one of the subordinate agencies of the State*, and whether done *directly*, *by taking the*

property of one person and vesting it in another or the public, or indirectly through the forms of law, by appropriating the property and requiring the owner thereof to compensate himself, or to refund to another the compensation to which he is entitled, would be wanting in that "due process of law" required by said amendment. The conclusion of the Court on this question is, that since the adoption of the Fourteenth Amendment compensation for private property taken for public uses constitutes an essential element in "due process of law," and that without such compensation the appropriation of private property to public uses, *no matter under what form of procedure it is taken*, would violate the provisions of the Federal Constitution.' To the same effect are *Henderson* v. *Central Passenger Railway*, 21 Fed. Rep. 358, and *Baker* v. *Village of Norwood*, 74 Fed. Rep. 997."

We ask the court specially to note that the prohibition of the Fourteenth Amendment is directed against any **legislative attempt** to take private property without compensation to the owner, whether done by the legislature itself **or under its delegated authority,** and whether done directly or indirectly through the forms of law; and that without *such compensation* the appropriation of private property to public uses, **no matter under what form of procedure it is taken,** would violate the provisions of the Fourteenth Amendment.

At this point we beg to submit that the authorities show clearly that in order to avail ourselves of the constitutional provision, we are not required to show that the alleged taking is under the usual open form of a taking by eminent domain. The Circuit Court said in its opinion, "the *taking* complained of in this case was by right of eminent domain, and not under the guise of taxation or police regulation." (R. 116.)

We submit, however, and show, that the taking complained of in this case was *not* by right of eminent domain, not merely because it was not in the usual form in which such right is applied, but because *it was wanting in the just compensation which is an essential element of eminent domain.*

> "The public, exercising the public power of compulsory purchase, otherwise called *eminent domain, whereof compensation is an essential element,* could authorize him as a public agent, in his natural or in his artificial capacity, to take as many of Eaton's rights of property as were necessary for a public use."
>
> *Thompson* v. *Androscoggin River Improvement Co.*, 54 N.H. 545, at page 557.

We admit that the taking complained of was "not under the guise of taxation or police regulation;" and we submit that we have a right to show that it was in any other form or guise, and that in this particular case *it was under the form or guise of a sale which was apparently voluntary, but which was really compulsory in fact and in law.* The above authority shows that the principle is equally applicable, whether done directly or indirectly by the legislature itself or by the municipal corporation, acting under the authority of the legislature, and whether done directly or indirectly through the forms of law and without regard to the form of procedure. That the present court has always reserved the right to pierce the guise under which a constitutional violation may be concealed is further shown as follows: —

> "*Loan Association* v. *Topeka*, 20 Wall. 655. In that case *a statute of Kansas was held invalid because by its provisions the property of the citizen under the*

GUISE* *of taxation would be* TAKEN *in aid of a private enterprise*, which was a *perversion* of the power of taxation."

The above statement of the case is the statement of the Supreme Court itself in —

Fallbrook Irrigation District v. *Bradley*, 164 U.S. at page 155, —

where the court further states, concerning the same case (*Loan Association* v. *Topeka*), —

"The ground of the decision was as stated, that the act **took** the property of the citizen for a private purpose, although under the **forms** of taxation." (164 U.S. at page 155.)

Here, we submit, is the highest authority for the proposition laid down by Mr. Justice JACKSON while circuit judge, and establishing the principle that —

Whether or not property is TAKEN *depends not upon the* FORM *of the transaction, but upon the* SUBSTANCE.

The same principle was early adopted in Massachusetts.

Austin v. *Murray*, 16 Pick. at page 126:

"The law will not allow the right of property to be invaded, under the *guise* of a police regulation for the preservation of health, when it is manifest that such is not the object and purpose of the regulation. Now

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* It is a violation of the Fourteenth Amendment to take the property of a railroad company under the "*guise*" of a *legislative regulation* as to mileage tickets.

Lake Shore &c. Co. v. *Smith*, 173 U.S. 684, 693.

we think this is manifest from the cases stated, in respect to the by-law in question."

That the court looks at the "essence and *effect*" of the state statute in determining the constitutional question of a taking is further expressly shown in —

Missouri Pac. R. Co. v. *Nebraska*, 164 U.S. 403.

All the so-called "railroad-rate cases" are based upon the principle that the **form** of the taking is immaterial, but that statutes apparently constitutional may, under the **form** of a constitutional regulation of rates, *be held by their unreasonableness and injustice, as applied*, to be **in effect** an unconstitutional taking of private property. Among these cases are the following, all depending upon the principles laid down in the case first mentioned below: —

Reagan v. *Trust Co.*, 154 U.S. 362.
Mercantile Trust Co. v. *Texas &c. Co.*, 51 Fed. Rep. 529.
Ames v. *Union Pacific Ry. Co.*, 64 Fed. Rep. 165.
Southern Pacific Co. v. *Board of Railroad Com'rs*, 78 Fed. Rep. 236.
Railway Co. v. *Dey*, 35 Fed. Rep. 866–868.
Capital City Gas Light Co. v. *Des Moines*, 72 Fed. Rep. 849.
Cotting v. *Kansas City &c. Co.*, 79 Fed. Rep. at page 679.

We submit, therefore, upon the above authorities, that we are entitled to go behind the *form* of the transaction involved in the present suit, and show that the sale was voluntary *only in form*, and "in essence and effect;" and was *in fact* and in law *compulsory;* and that in "*substance*," "*in essence and effect*," it was a *taking* of property of

the plaintiff company for public uses but *without compensation*.*

III.

IT IS NOT ONLY SETTLED, AS ABOVE SHOWN (II.), THAT THE OWNER OF PRIVATE PROPERTY MAY BE DEPRIVED OF IT BY STATE ACTION IN ANY FORM WHICH IS IN EFFECT OR IN SUBSTANCE A TAKING THEREOF; BUT IT IS ALSO SETTLED THAT A SALE WHICH IS COMPULSORY IN LAW UNDER A STATE STATUTE IS THE EQUIVALENT OF A TAKING BY THE STATE.

We do not need to go outside of Massachusetts decisions upon this point, for they hold clearly that a sale which is compulsory in law is the equivalent of a taking by the state. See —

Parks v. *Boston*, 15 Pick. 198, at page 208.
Norcross v. *Cambridge*, 166 Mass. 508, at pages 511, 512.†

In New Hampshire it is likewise held that a *taking* by eminent domain is the equivalent of a compulsory purchase.

In *Thompson* v. *Androscoggin River Improvement Co.*, 54 N.H. 545, the court said, at page 557, —

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* That questions of fact may be involved in the determination of the constitutional question without changing the essence of the case as one "arising under the Constitution of the United States," see Point VI. of plaintiff's brief upon motion to dismiss, and cases cited thereunder.

See also opinion of Chief Justice MARSHALL in —

Osborn v. *United States Bank*, 9 Wheat. *738, at pages *821–823.

† This happens to be the very case which approves (166 Mass. at page 510) *Moore* v. *Sanford*, 151 Mass. 285.

"How, then, could R. acquire the right to pour the river upon Eaton's farm through a cut which it would be an unreasonable use of his own land for him to make? By a *purchase, voluntary* or *compulsory*. The public, exercising the public power of **compulsory purchase** *otherwise called eminent domain, whereof compensation is an essential element*, could authorize him as a public agent, in his natural or in his artificial capacity, to **take** as many of Eaton's rights of property as were necessary for a public use."

The above extract is taken from the quotation in Lewis on Eminent Domain, p. 55, where the above case and the Eaton case are treated as leading cases.

See Lewis on Eminent Domain, at pages 48–56.

IV.

IT RESULTS FROM THE THREE PRECEDING POINTS THAT DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT REQUIRES COMPENSATION TO BE PAID OR SECURED TO THE OWNER OF PRIVATE PROPERTY SOLD TO A MUNICIPAL CORPORATION FOR PUBLIC USE BY A SALE WHICH, AS REGARDS SUCH OWNER, IS COMPULSORY IN LAW UNDER THE STATE STATUTE WHICH AUTHORIZES SUCH SALE.

V.

AS TO WHAT CONSTITUTES LEGAL COMPULSION, AND ESPECIALLY COMPULSION BY A GOVERNMENT OR ITS OFFICERS; AND AS TO THE KIND OF COMPULSION WHICH CONSTITUTES DURESS, AND RENDERS INVOLUNTARY IN LAW (AS WELL AS IN FACT) WHAT APPEARS TO BE VOLUNTARY.

WHILE ORDINARILY WHAT MAY BE LAWFULLY DONE MAY BE LAWFULLY THREATENED, YET IF THE GOVERNMENT, OR AN OFFICER OF THE GOVERNMENT ACTING

UNDER COLOR OF OFFICE, THREATENS AN INDIVIDUAL WITH SERIOUS LOSS, UNLESS THE INDIVIDUAL WILL MAKE A CONTRACT TO DO SOMETHING NOT REQUIRED BY LAW, — DIFFERENT FROM THAT REQUIRED BY LAW, — AND IF THE CONTRACT IS MADE UNDER THE INFLUENCE OF SUCH THREAT, SUCH CONTRACT, THOUGH VOLUNTARY IN APPEARANCE, BECOMES THEREBY COMPULSORY IN FACT AND IN LAW, AND IS OBTAINED BY DURESS.

The Circuit Court held, as already stated, that "the plaintiff's whole position hinges on the question of compulsion" (R. 123); and that the "CRUCIAL POINT "in determining that question was — *whether the statutory threat of municipal competition produced compulsion which amounted to duress.*" (R. 123.) Later in the opinion the court said, —

> "*The whole question of compulsion or duress in this case turns upon the question whether municipal competition, actual or threatened, under the authority of the state, was justified by law.*" (R. 124.)

As the decision of the Circuit Court against us was based upon this point, we beg to discuss the point in connection with the Circuit Court's treatment of it.

Quoting and following certain decisions of the Supreme Court, notably *Hamilton Gas Co.* v. *Hamilton*, 146 U.S. 258, the Circuit Court held it to be settled law in the present case that *the legislature had the right to* AUTHORIZE *municipal competition.* (R. 116–120.)

The Circuit Court then held as follows: —

> "*If competition be lawful, threatened competition is lawful. And if it were lawful for the State to authorize municipal competition, it was not unlawful for it to threaten to authorize municipal competition.*
>
> "But it is urged, and *this is the* CRUCIAL POINT in the plaintiff's argument, that *the threat of competition pro-*

> *duced* COMPULSION *which amounted to duress, and, consequently, made* the sale by the company to the city not a voluntary but a compulsory act, and being compulsory its effect was a *taking* of the plaintiff's property without just compensation. *The plaintiff's whole position hinges on the question of* COMPULSION." (R. 123.)

[The italics, of course (excepting the word "taking," which was italicized by the court), are our own.]

We concede that, as the Circuit Court says, "this is the crucial point in the plaintiff's argument."

We submit it is equally true that what is quoted above is the crucial point in the argument or reasoning of the Circuit Court which caused it to reverse the position it took when it overruled defendant's demurrer and finally dismissed plaintiff's bill. We need, therefore, no excuse for fully presenting this point: and this, not merely as a matter of justice to the plaintiff in these two cases, but also because, as we shall show, the legislation here complained of was a new departure from the many attempts, skilful and unskilful, earlier made to despoil corporations by methods resorted to in the hope of evading the constitutional provisions which were created to protect individuals against the states.

While the Circuit Court reaches the conclusion that there was no compulsion in law in the present case, upon an examination of cases cited by the plaintiff, we beg the court to note, what the Circuit Court failed to note, that it is *not* always lawful for either an individual or the state to threaten what might be lawfully done; but that it is *unlawful* to *threaten, with a certain condition or conditions attached*, what *might* be lawfully *done, if not threatened;* or what might be lawfully threatened *if no condition were attached;* in short, that **the lawfulness of the threat may depend wholly upon the condition annexed to it; and that such condition may make such threat unlawful, and lead**

to the conclusion that the act performed by the threatened party under the influence of such threat is compulsory in law as well as in fact.

As to threats made by an individual.

Contracts may be avoided which are "obtained by the **threat of unquestionably legal acts."**

The above quotation is from the opinion of HOLMES, J., in —

Silsbee v. *Webber*, 171 Mass. at page 381.

The same opinion recognizes that "*ordinarily*, what you may do without liability you may threaten to do without liability."

The opinion also states just what we claim here:

> "When it comes to the COLLATERAL *question* of obtaining a contract by threats, *it does not follow that, because you cannot be made to answer for the act, you may use the threat.* . . .
>
> "Some of the cases go further, and *allow to be avoided contracts obtained by the threat of* **unquestionably lawful acts.** *Morse* v. *Woodworth*, 155 Mass. 233, 251. *Adams* v. *Irving National Bank*, 116 N.Y. 606. *Williams* v. *Bayley*, L.R. 1 H.L. 200, 210."
>
> Ibid. pp. 380, 381.

The case of —

Morse v. *Woodworth*, 155 Mass. 233, —

above cited by Mr. Justice HOLMES, is regarded throughout the country as a leading modern case upon duress by threats. We submit to the inspection of the present court that it negatives the alleged rule of law laid down by the Circuit Court as constituting the "crucial point" upon which that court decided the present case against the plaintiffs.

See also *Taylor* v. *Jaques*, 106 Mass. 291.

It is also to be noted that, presumably, the federal court is applying Massachusetts law to these cases, wherein the contestants are all Massachusetts parties. We ask nothing better than that this case be governed by the law of Massachusetts. We shall show, however, that the law of the present court is in accord with the Massachusetts law and with what we claim thereunder.

Further authority showing when it is unlawful for an individual to threaten what it would be lawful simply to do.

That a "threat is a threat of 'unlawful imprisonment when made for the sole purpose of inducing the execution of the contract or conveyance, even though the party was *guilty of the charge for which* prosecution was threatened, and the *demand made is that the person shall repair the effect of his guilt*," is held in England, Alabama, Illinois, Kansas, Massachusetts, Missouri, Nebraska, New York, Rhode Island, and Wisconsin.

See Amer. & Eng. Encyc. of Law (2d ed.) vol. x. pp. 343, 344.

The Massachusetts cases there cited are two of the cases we have cited above; viz., —

Morse v. *Woodworth*, 155 Mass. 235.
Taylor v. *Jaques*, 106 Mass. 291.

As to threats made by a GOVERNMENT, or its officers acting under color of office.

Upon this point the Circuit Court held as follows: —

"*Duress by the Government or its officers*, in this class of cases, is defined by the Supreme Court as 'moral duress not justified by law.' *Maxwell* v. *Griswold*, 10 How. 242, 256. It must be the pressure

* That one may be also criminally liable in Massachusetts who threatens what he could lawfully do without threat.

arising from unlawful acts or demands on the part of the Government or its officers to produce that constraint of will or action, or state of necessity or compulsion, which render acts voluntary in form, involuntary and void. *In this class of cases the test is, was the cause of the compulsion lawful or unlawful. If the compulsion be founded on lawful competition, or the threat of lawful competition there is no element of illegality about it. Such compulsion is justified by law.*

"The *whole question of compulsion or duress* in this case *turns upon whether municipal competition*, actual or *threatened, under the authority of the State, was justified by law.*" (R. 124.)

The Circuit Court then cites and quotes from four decisions of the present court as having been "relied on by the plaintiff," and as to these the Circuit Court held as follows: —

"In the Supreme Court cases relied on by the plaintiff it will be found that the compulsion or duress was based upon an illegal act or exaction, or threatened illegal act or exaction, by the Government or its officers." (R. 124.)

These four cases were as follows: —

United States v. *Tingey*, 5 Pet. 115, 129. (R. 124.)

Maxwell v. *Griswold*, 10 How. 242. (R. 125.)

Swift Co. v. *United States*, 111 U.S. 22, 28. (R. 125.)

Robertson v. *Frank Brothers Co.*, 132 U.S. 17. (R. 126.)

The Circuit Court's opinion then proceeds as follows: —

"In the above cases, which are cited by the plaintiff, it is seen that it is the element of illegality which

> lies at the foundation of this species of duress. In those cases the moral duress was caused by the illegal acts or demands of the Government or its officers. In the case at bar there was no moral duress not justified by law, *because it was lawful for the State to authorize, or threaten to authorize, municipal competition.*" (R. 126, 127.)

Now it is to be noted that the Circuit Court, while it uses the term "threatened illegal act or exaction," yet *fails to note that there is a distinction between the threat and the exaction.*

Again, using as an example the duress of the highwayman, who, pistol in hand, says, "your money or your life," we submit that obviously this contains a threat *and* an exaction. The threat, "your life," is the threat of murder, while the exaction "your money" is the compulsory taking of private property for private purposes. In such case, obviously, both the threat and the exaction are illegal. But an examination of the above authorities, under the subdivision that "contracts may be avoided which are obtained by the threat of unquestionably legal acts," shows that a threat may be lawful under certain circumstances, and yet may become unlawful when coupled with an exaction which would be lawful *if voluntary*, but which cannot be *required.*

The Tingey Case.

United States v. *Tingey*, 5 Pet. 115.

We claim and submit that a careful examination of this case, and an application of it to the present cases, will show the fundamental error of the Circuit Court in its conclusion that, although the sale in the present case was compulsory in fact, it was not compulsory in law.

For the conclusion reached in the Tingey case by the present court is that a *threat* made by an officer of the government under color of his office, *which in itself would be a lawful threat, when coupled with an exaction which is variant from what is required by law, makes the contract entered into under influence of such threat compulsory in law as well as in fact.*

In order to make sure of the correctness of this claim, we beg to repeat here the quotation made by the Circuit Court from the opinion in the Tingey case:

> "In the Supreme Court cases relied on by the plaintiff it will be found that the compulsion or duress was based upon an illegal act or *exaction*, or threatened illegal act or *exaction*, by the Government or its officers.
>
> "*United States* v. *Tingey*, 5 Pet. 115, 129, was a suit brought by the government upon a bond, variant from that prescribed by law, demanded of a public officer upon the peril of losing his office. Mr. Justice STORY, delivering the opinion of the court, said:
>
> "'The substance of this plea is, that the bond, with the above condition, variant from that prescribed by law, was, under color of office, *extorted* from Deblois and his sureties, contrary to the statute, by the then Secretary of the Navy, as the *condition* of his remaining in the office of purser, and receiving its emoluments. *There is no pretence then to say that it was a bond* VOLUNTARILY *given*, or that, though different from the form prescribed by the statute, it was received and executed without objection. It was *demanded* of the party, *upon the peril of losing his office;* it was *extorted* under *color of office*, against the *requisitions* of the statute. It was plainly, then, an *illegal* bond; for no officer of the government has a right, by color of his office, to require from any subordinate officer, as

> a *condition* of holding office, that he should execute a bond with a *condition different from that prescribed by law;* that would be, not to execute, but to supersede, the requisitions of law; it would be very different, where such a bond was, by mistake or otherwise, voluntarily substituted by the parties for the statute bond, *without any coercion or extortion by color of office.*'" (The italics are ours.) (R. 124.)

Note that the Circuit Court said, —

> "In the Supreme Court cases relied on by the plaintiff it will be found that the compulsion or duress was based upon an illegal act or *exaction*, or threatened illegal act or *exaction*, by the Government or its officers." (R. 124.)

Let us see what was the "threatened illegal act or exaction" in the Tingey case; or, to be more exact, let us see what was the threat and what was the exaction in the Tingey case.

1. The thing threatened was that the purser should lose his office and its emoluments. This threat, in and by itself, was lawful.

For the report shows (5 Pet. at page 117) that the Secretary of the Navy had the legal power to deprive the purser of his "office and emoluments;" and it would seem that, under the then existing circumstances, it was even his duty to do so. Thus the thing threatened was lawful.

2. The "*exaction*" was the "compulsion to give or furnish"* a bond containing a provision "variant from that prescribed by law" (*ut supra*), *i.e.*, "*different* from that prescribed by law." (5 Pet. 115, last paragraph of headnote.)

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* "Exaction . . . Compulsion to give or furnish." Webster's Dictionary.

(*a*) The thing exacted was a "bond *variant*," "*different* from that prescribed by law."

An examination of the full report of the case indicates that the bond exacted was simply a bond which would require the purser to account for moneys of the United States which might come into his hands in *addition* to those received by him as *purser*. Of course he was liable in law to account for *all* such moneys. The only bond which could be required of him, however, was a bond to cover such moneys as should be received by him as *purser*.

3. The threat was made by the Secretary of the Navy, a government officer of rank superior to the officer threatened, who was a purser in the navy, that the latter officer would be deprived of his office and pay unless he would submit to such exaction, that is, would give or furnish a bond "variant," "different," from that required by law. The court held that that threat made the bond so given illegal, and given under duress; and was therefore void.

4. The Supreme Court held that the thing exacted, namely, a bond "variant," "different," from that prescribed by law, would be valid, *if voluntarily given*.

5. The Supreme Court then connects the threat with the exaction, and reaches its conclusion of duress as follows: —

But when it was made known by an officer (the Secretary of the Navy) superior to the purser, that, unless the exaction was yielded to, — that is, unless he would give a bond "variant," "different" from that required by law, the thing threatened, — loss of office and pay, — would result; and when accordingly such bond was given, it was held by the Supreme Court to have been thereby "extorted under color of office." And the court's conclusion was, "*there is no pretence then to say that it was a bond voluntarily given*."

If the rule of law had been the rule as laid down by the Circuit Court in the present case, then the reasoning of the

Supreme Court in the Tingey case would have been applied as follows: —

1. It was lawful for the Secretary of the Navy to deprive the purser of his office and emoluments.

2. But if it was lawful for the Secretary of the Navy to deprive the purser of his office and emoluments, it was lawful for said Secretary to *threaten* to deprive the purser as aforesaid.

3. Therefore the bond given under such threat was voluntary in law even if it were compulsory in fact.

The conclusion actually reached, however, was that *the bond was given under duress*, because the threat was conditioned upon the purser's making or giving a *contract to do something variant from law, — not required by law; and which would also be lawful if done voluntarily*.

To render still more conspicuous the error of the Circuit Court upon this crucial point of the case in failing to consider the exaction as one of the elements in legal compulsion, and in treating the threat alone as constituting duress, we beg to place in parallel columns the exact propositions of the Circuit Court in the Newburyport case, and a paraphrase of the same in terms of the Tingey case.

What the Circuit Court said in the Newburyport case.	*Paraphrase, in terms of the Tingey case, of what the Circuit Court said in the Newburyport case.*
[1] "The plaintiff argues that the measure of compensation provided by the Act of 1894 was not justified by law, and that, consequently, the principle recognized in the above cases is applicable to the present case.	[The Circuit Court is not quite correct in the statement opposite. The plaintiff's argument is that plaintiff could not be required by law (and therefore that such requirement is not justified by law) to sell all of its property and receive in

payment the value of only *part of the property sold.* Turning now to the Tingey case, the parallel argument would be as follows:]

[1] It is argued that the exaction of a bond variant from that required by law was not justified by law.

[2] "But this is an attempt to connect things that are entirely distinct. The compensation to be paid for the plaintiff's property has nothing to do with the subject of duress.

[2] But this is an attempt to connect things that are entirely distinct. The exaction of a bond containing terms variant from that provided by law has nothing to do with the subject of duress.

[3] "It was not the want of just compensation, but the threat of municipal competition, which was the cause of the alleged duress.

[3] It was not the exaction of a bond variant from law, but the threat of loss of office and pay, which was the cause of the alleged duress.

[4] "To connect the alleged duress with the lack of compensation involves the proposition that the compulsion which forced the plaintiff to deed its property to the City was owing to the unlawful compensation provided by the Act of 1894, and not to the threatened competition by the City.

[4] To connect the alleged duress with a bond variant from law involves the proposition that the compulsion which forced the giving of such bond was owing to the exaction of a bond containing terms variant from that provided by law, and not to the threatened loss of office and pay.

[5] "The want of just compensation has no bearing

[5] The exaction of a bond variant from law has

on the question before us unless the plaintiff first establishes a duress not justified by law." (R. 127.)

no bearing on the question before us unless the plaintiff first establishes a duress not justified by law. [!]

That is to say, the Circuit Court reached a conclusion which is the exact opposite of the conclusion and decision of the Supreme Court of the United States in the Tingey case.

We submit we have here shown conclusively that the Circuit Court has made the fundamental, controlling error of considering the threat BY ITSELF instead of considering together all the essentials as laid down by the Supreme Court and shown by the above analysis.

The Tingey case cited and approved in subsequent authorities.

The case of *United States* v. *Tingey*, 5 Pet. 115, was decided in 1831.

As showing the extent to which it has been adopted and applied, we place in the footnote below a quotation from Rose's notes on United States Reports, vol. 3, at pages 161, 162.*

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*"OFFICIAL BOND. — A bond exacted by a public officer, under color of office and different from that required by law, is obtained by extortion, and void, p. 129.

"Cited, affirmed and followed upon this point in the following: *United States* v. *Humason*, 6 Sawy. 202, 203, F.C. 15,421; *Hawes* v. *Marchant*, 1 Curt. 139, 141, 143, F.C. 6,240; *Humphreys* v. *Humphreys*, 1 G. Greene, 484; *Boston* v. *Capen*, 7 Cush. 124; *Leona etc. Co.* v. *Roberts*, 62 Tex. 622. Cited and principle applied in *Constable* v. *National S.S. Co.*, 154 U.S. 78, 38 L. 916, 14 S. Ct. 1073, holding

The Tingey case was deliberately adopted as law by the Supreme Judicial Court of Massachusetts in 1851 in —

Boston v. *Capen*, 7 Cush. 116, at page 124; see pages 123–125.

The report shows that the case was fully argued by two of the most distinguished counsel of the Boston bar, Peleg W. Chandler, the then city solicitor, and Benjamin R. Curtis.

The present court has never overruled the Tingey case; and the Massachusetts court, so far as we know, has not

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invalid a contract exacted by a revenue officer from ship company, making it liable to consignee for loss of goods, as prerequisite of right to leave them on wharf: *United States* v. *Mynderse*, 27 Fed. Cas. 57; *United States* v. *Mynderse*, 11 Blatchf. 5, 7, F.C. 15,851, and *United States* v. *Humason*, 5 Sawy. 539, F.C. 15,420, both holding where bond exceeds in terms that required by statute, it is void as to such excess; *State* v. *Taylor*, 10 S. Dak. 184, 66 Am. St. Rep. 708, 72 N.Y. 408, holding excessive bond valid to statutory amount; *State* v. *Shirley*, 1 Ired. L. 603, bond taken by public officer not authorized to receive it, is void; *Janes* v. *Reynolds*, 2 Tex. 256, the element of fraud *colore officii* must exist; *Johnson* v. *Erskine*, 9 Tex. 5, conditions being more onerous than required by statute, bond is void. Compared in *Greathouse* v. *Dunlap*, 3 McLean, 312, 314, F.C. 5,742, to case where illegal bond is extorted from defendant imprisoned for want of special bail. Cited, *arguendo*, *United States* v. *Humason*, 7 Sawy. 263, 8 Fed. 79; *United States* v. *Jones*, 77 Fed. 720, 721, 722; *Territory* v. *Golding*, 3 Utah, 48, 5 Pac. 550; *Alston* v. *Alston*, 34 Ala. 25; *State* v. *Dews*, Charlt. (Ga.) 434; *Patterson* v. *Gibson*, 81 Ga. 805, 12 Am. St. Rep. 358, 10 S.E. 10."

since rejected the Tingey case; nor has it ever overruled or doubted the case of *Boston* v. *Capen*, in which the Tingey case was adopted and applied, and by which it became part of the settled law of Massachusetts. Are we not justified, then, in respectfully urging that we have a right to have the Tingey case and the Capen case applied in the present litigation?

We submit that if this be done, it is established under the above authorities that the Circuit Court was in error at the crucial point of its own argument; and that its conclusions there should have been as follows:—

That while "ordinarily, what may be lawfully done, may be lawfully threatened,"* yet if the government, or an officer of a government, acting under "color of office," threatens an individual with serious loss, unless the individual will make a contract to give or do something not required by law,—different from that required by law,—and if the contract is made under the influence of such threat, "there is no pretence then to say it was a" [contract] "voluntarily given;" but such contract is compulsory in fact and in law and is obtained by duress.

We submit it is worthy of note that, although the Circuit Court devoted several pages to an examination of authorities upon the undisputed point that where the local company's charter is not exclusive the legislature has a right to authorize municipal competition, yet the Circuit Court *failed to cite a single authority upon what is called the "crucial point."*

Anticipating that counsel for the defendant may repeat here what was offered to the Circuit Court upon the same point, we beg to state that in their brief upon the constitutional question they made the following claim: —

* See *Silsbee* v. *Webber*, 171 Mass. at page 381, quoted *ante*, p. 71.

> "It is not duress, unlawful compulsion, or the subject of any complaint in law, for one to ***threaten*** to do what he has a ***legal right*** to do."

[The italics are theirs.]

Note that this is merely the statement of what the Massachusetts court says is *ordinarily* true.

> "*Ordinarily* what you may do without liability, you may threaten to do without liability," —

but both the counsel and later the Circuit Court failed to note the *collateral* question of obtaining a contract by threats.

> "*When it comes to the collateral question of obtaining a contract by threats, it does not follow that, because you cannot be made to answer for the act, you may use the threat.*"

See opinion of HOLMES, J., in —

> *Silsbee* v. *Webber*, 171 Mass. at pages 380, 381, quoted *ante*, p. 71.

It was obviously this principle which the Supreme Court applied in the Tingey case. Whether or not it was the duty of defendant's counsel to do more than present and argue the ordinary rule, we submit that it was *error for the Circuit Court* not to go beyond the ordinary rule and not to dispose of the case upon the more particular question presented under the *collateral* question "of obtaining a contract by threats."

Counsel for defendant, in support of the general rule, cited ten cases to the Circuit Court; yet, in an opinion replete with the examination of authorities, that court cited no case whatever upon this "crucial point;" — a strong indication, we submit, that none of defendant's cases fully sustained the point.

We do not feel justified in taking time or space to examine them here. It should go without saying that none of the cases which we have cited above were amongst them. We beg, however, to present one of defendant's citations as an example; viz., —

Johnson v. *Reed*, 136 Mass. 421.

We submit that the above case does not go even to the extent of supporting the general claim that one has a right to threaten to do what he has a legal right to do.

Moreover, the case calls particular attention to the law that the doing of what one would ordinarily have the right to do is rendered unlawful when done "for the purpose of compelling the defendant to do some *collateral* thing which he could not lawfully be compelled to do."

136 Mass. at page 423.

In short, *this Massachusetts case furnishes an analogy directly in support of our above claim* and argument as to the scope and effect of the Tingey case.

The other three cases of duress by government or its officers referred to by the Circuit Court "as relied on by the plaintiff," were and are relied on particularly to meet objections which might be raised to the effect that, even if the threat of municipal competition originally produced legal compulsion, such compulsion was destroyed by plaintiff's subsequent acts, such as the giving of a deed, etc. These cases are examined elsewhere herein in connection with such points.

It is worth noting here, however, that the Circuit Court reached its erroneous unqualified conclusion that whatever may be lawfully done may be lawfully threatened, without reference to a single case cited by the defendant; also that this conclusion was apparently based upon four cases

cited by plaintiff concerning compulsion by government and its officers; and that not one of said four cases holds, either expressly or by implication, the rule thus asserted by the Circuit Court. We submit to the inspection of the present court that the most careful examination of these cases will fail to discover therein the rule or principle that whatever can be lawfully done can be lawfully threatened. In fact, in each of these cases the threat, either with or without other concomitants, *was held to produce duress;* and the Tingey case was, we submit, *in principle* on all-fours with the present case, and was based upon the rule which we have shown above, and under which, we claim and submit, it will be conclusively established by the following points that the sale provided in the statute, though voluntary in form and appearance, was in effect and in substance compulsory in fact and in law.

VI.

APPLICATION OF THE FOREGOING PRINCIPLES OF LAW TO THE PRESENT CASE.

A.

THE GOVERNMENT, THAT IS, IN THIS CASE, THE COMMONWEALTH OF MASSACHUSETTS, BY THE ACT OF 1894 (C. 474), IN EFFECT THREATENED THE PLAINTIFF WITH SERIOUS LOSS UNLESS THE PLAINTIFF WOULD, BY AN APPARENTLY VOLUNTARY SALE AND CONTRACT, DO SOMETHING NOT REQUIRED BY LAW.

B.

THE PLAINTIFF, UNDER THE INFLUENCE OF SUCH THREAT, DID WHAT WAS REQUIRED, AS ABOVE, TO WIT, MADE THE APPARENTLY VOLUNTARY SALE PROVIDED FOR IN THE ACT OF 1894, WHICH SALE INCLUDED THE DISPUTED

FRANCHISE RIGHTS FOR WHICH PLAINTIFF RECEIVES NO COMPENSATION.

C.

THE SALE BECAME THEREBY COMPULSORY IN LAW.

A.

That the government, that is, in this case, the Commonwealth of Massachusetts, by the act of 1894 (c. 474), *in effect threatened the plaintiff with serious loss unless the plaintiff would, by an apparently voluntary sale and contract, do something not required by law.*

We are entitled to show the substance and effect of the statute and its purpose, but not the motives of the legislature.

We have already shown (Point II., *ante*, p. 62) that we are entitled to go behind the form of the statute and to show what it was *in substance and effect;* and this was held particularly in determining questions of constitutionality, and especially as relating to alleged violations of the Fourteenth Amendment.

As establishing this point we cited —

Chicago &c. R.R. v. *Chicago*, 166 U.S. at pages 238, 239, and cases cited therein.
Loan Association v. *Topeka*, 20 Wall. 65.
Fallbrook Irrigation District v. *Bradley*, 164 U.S. at page 155.
Lake Shore &c. v. *Smith*, 173 U.S. 684, 693.
Austin v. *Murray*, 16 Pick. at page 126.
Missouri Pacific R.R. v. *Nebraska*, 164 U.S. 403.

It seems that in determining the constitutionality of a state act, its *purpose* will be taken into consideration,

though the motives * of the legislature in enacting the statute will not be considered.

Even so, the present court has held distinctly that —

The purpose of the statute must be determined by its natural and reasonable effect.

If, then, the court considers both the effect and the purpose, and ascertains the purpose from the effect, our inquiry is practically limited to the *effect* of the act, and the purpose will be inferred or deduced therefrom.

We submit that what we have claimed as to the purpose and effect is established in the two cases cited and quoted below.

Henderson v. *Mayor of New York*, 92 U.S. 259, at pages 268, 269:

"In whatever language a statute may be framed, its *purpose* must be determined by its *natural and reasonable effect;* and if it is apparent that the *object* of this statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore, and landed at the port of New York, it is as much a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the Passenger Cases.

"*To require a heavy and almost impossible condi-*

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* "MOTIVES OF LEGISLATURE. — It is not within the province of the judiciary to inquire into the motives actuating the law-making body."

6 Amer. & Eng. Encyc. of Law (2d ed.) p. 1087, giving a long list of federal and state authorities containing (note 5), *inter alia*, —

Ex parte McCardle, 7 Wall. 514.

Doyle v. *Continental Ins. Co.*, 94 U.S. 535.

tion to the exercise of this right, with the alternative of payment of a small sum of money, is, IN EFFECT, to *demand* payment of that sum. . . . It is a law *in its purpose and effect* imposing a tax on the owner of the vessel for the privilege of landing in New York passengers transported from foreign countries."

Collins v. *New Hampshire*, 171 U.S. 30, at pages 33, 34:

"The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is *not in so many words* either enacted or distinctly provided for. In whatever *language* a statute may be framed, its *purpose* must be determined by its natural and reasonable effect. *Henderson* v. *Mayor of New York*, 92 U.S. 259; *Morgan Steamship Co.* v. *Louisiana*, 118 U.S. 455, at 462. Although under the *wording* of this statute the importer is *permitted* to sell oleomargarine freely and to any extent provided he colors it pink, yet the *permission to sell*, when accompanied by the imposition of a condition which, if complied with, will effectually prevent any sale, *amounts in law to a prohibition*."

"*The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty — indeed, are under a solemn duty — to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority.*"

The above quotation is from the opinion of HARLAN, J., in —

Mugler v. *Kansas*, 123 U.S. at page 661;

and the opinion then proceeds as follows: —

"If, therefore, a statute *purporting* to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a *palpable invasion of rights* secured by the fundamental law, *it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.*"

Ibid. at page 661.

It is likewise true that questions of duress are to be determined not merely upon the form of the language used, but upon what was said or done IN EFFECT.

In *Swift Co.* v. *United States*, 111 U.S. at page 28, the court, after describing what the internal revenue bureau said and did, proceeded, —

"This was in effect to say to the appellant, that unless it complied with the exaction, it should not continue its business; for it could not continue business without stamps and it could not purchase stamps except upon the terms prescribed by the commissioner of internal revenue."

Upon its finding of *what was thus said in effect*, the court held that the apparently voluntary payment was involuntary in law.

I. The municipal competition authorized by the statute meant serious loss to the plaintiff company, to wit, its inevitable damage and ruin.

This was recognized in the opinion of the state court in the proceedings there under the present statute.

"Of course, an offer by the Water Company, made under the threat of *municipal competition* and *to avoid ruin*, might be voluntary only in name." (R. 54.)

Similarly, in the Gloucester case, the state court, by Mr. Justice LORING, said, —

> "It is plain that *a private water company* organized for net profits *cannot hope to compete with a city*, which can rely upon taxes to supply a deficit in operating expenses. For that reason, it is also plain that if the legislature had not required the city to buy the water company's property, *the company's property would have been practically, though not legally, confiscated.*" (Gl. R. 85.)

In similar vein, the Supreme Court of Pennsylvania said, in —

> *White* v. *City of Meadville*, 177 Pa. St. at page 651, —

> "If anything be manifest, it is, that if two water mains be laid side by side on the same street, equally accessible to the householder on each side, conveying double the quantity needed, with double sets of hydrants, pumping stations, offices, salaries and expenses, one or the other must be abandoned. No community will pay double for any article of necessity or luxury. If the property holder must, by compulsory taxation, support the municipal system, he will not voluntarily support the private corporation system; such a conflict of interests will inevitably bankrupt the system which depends on the voluntary patronage of the public. We hesitate to assume, every Court is bound to hesitate long before assuming, the Legislature intends, by grants to distinct corporations for public purposes, there shall arise such conflict in the exercise of the franchises as will result in the practical destruction of property of any citizen without compensation. It is a cardinal rule of construction between older and younger grants of franchises, the sovereign

does not intend the younger shall infringe on the older; but to assume these franchises can be in existence and in operation at the same time, is to assume the Commonwealth has granted precisely the same thing to the municipality that it had already granted to the Water Company; for in a business view, the contemporaneous exercise of the franchises is impossible."

To the same effect see —

Westerly Water Works v. *Westerly*, 75 Fed. Rep. 181.

See also —

Ziegler v. *Chapin, Mayor &c.*, 126 N.Y. 342, —

where the New York court said as follows: —

"The proposal to annex the town of New Lots to Brooklyn had in it elements of danger to the water supply company. *If the city should parallel the existing mains and furnish its own supply, the company might easily be ruined*, and it was natural that the interest thus threatened should seek some measure of protection in the Annexation Act itself. It is not surprising, therefore, to find in that act provisions framed to meet the emergency. The plan adopted was to authorize a purchase by the city of the plant of the company and shut off the city's competition if it refused to buy."

The later decision of the present court in —

Walla Walla v. *Walla Walla Water Co.*, 172 U.S. 1, —

supports the above authorities. We quote, therefore, as follows (Ibid. 11): —

"We think, however, that it sufficiently appears that, if the city were allowed to erect and maintain competing water works, *the value of those of the plaintiff company would be materially impaired, if not practically destroyed.* The city might fix such prices as it chose for its water, and might even furnish it free of charge to its citizens, and raise the funds for maintaining the works by a general tax. It would be under no obligation to conduct them for a profit, and *the citizens would naturally take their water where they could procure it cheapest.* The plaintiff, upon the other hand, must carry on its business at a profit, or the *investment becomes a total loss.* The question whether the city should supply itself with water, or contract with a private corporation to do so, presented itself when the introduction of water was first proposed, and the *city made its choice not to establish works of its own.* Indeed, it expressly agreed, in contracting with the plaintiff, that until such contracts should be avoided by a substantial failure upon the part of the company to perform it, the city should not erect, maintain or become interested in any water works except the plaintiff's. *To require the plaintiff to aver specifically how the establishment of competing water works would injure the value of its property, or deprive it of the rent agreed by the city to be paid,* is to demand that it should set forth *facts of general knowledge, and within the common observation of men. That which is patent to any one of average understanding need not be particularly averred.*"

Under the above decisions it was unnecessary to introduce any evidence whatever as to the ruinous effect of the municipal competition threatened under the statute.

We showed, however, that the ruinous result to plaintiff was contemplated, even by the city itself, while it was at-

tempting to secure from the legislature the right to initiate and carry on such competition.

In the contest before the legislative committee of 1894, *the mayor of the city* testified before the legislative committee as shown by the affidavit of Thomas E. Major (one of the official stenographers), filed with the bill, showing that at such hearing Mayor Gurney testified upon cross-examination as follows: —

> "*Question.* When you go into competition it would be with the view of ruining the water company?
>
> "*Answer.* No, sir; but with a view of the protection of the citizens, *but I think that will be the natural effect, that* **the water company will be ruined.**
>
> "*Question.* Then the plan you profess to adopt is one which in your expectation **will involve the ruin of the company?**
>
> "*Answer.* **I do not see any other way for it; I do not think they can compete with the city.**" (R. 93.)

We now come to a point which has been extensively disputed and argued in both the state and circuit courts, but was not decided by either of them, and which it remains for this court to decide:

2. The statute (1894, c. 474) provided that the sale from the Water Company to the City should comprise the Water Company's franchise rights (1) to the use of the streets in supplying water, and (2) to collect water rates.

[Hereunder — that the act of 1893 became void by the City's vote not to purchase under that act.]

Such rights — franchises — were the PROPERTY of the Water Company.

It is not denied (as we understand it) that the terms of the statute both naturally and technically would include

what the plaintiff claims above; but *the City has claimed that the statute cannot be so construed* for the following reasons: —

(*a*) Because the Supreme Court of the state adopted the contrary construction, which is binding upon the Supreme Court of the United States.

(*b*) Because the City received a complete water franchise by the act of 1893, and was in possession of it thereunder when the act of 1894 was passed.

We, *per contra*, contend, —

(a) The Supreme Court of Massachusetts did NOT decide the question of construction whether or not the sale included the Water Company's right to the use of the streets in supplying water and to collect water rates, or whether the act of 1894 provided that the sale and deed from the Water Company to the City should comprise the same.

This is shown by the following quotation from the opinion of HOLMES, J.: —

"The chief complaint of the petitioner is that no allowance is made for its right to lay and maintain pipes in the streets and its right to collect water rates. *There was much discussion whether these are among the 'rights' which the city buys under sect. 1 of the act*, and, if so, whether they are embraced in the provision that the value of the property shall be estimated without enhancement on account of, among other things, the franchise of the company. *As bearing upon this there was a good deal of argument as to whether the statute of 1893, chapter 471, was in force, the city having voted not to purchase the petitioner's property as therein provided, but afterwards having voted to accept the act. We do not think it necessary to go into these considerations*, or even to examine with great accuracy how far the rights in

question have not been allowed for. The direction to 'determine the fair value of said property for the purposes of its use by said city' is clear enough without going into controverted questions." (R. 53, 54.)

Farther down on the same page of the opinion (R. 54) we find the state court expressly "*Assuming* that the act of 1893 was *not* in force."

We submit to the inspection of the present court that this position was not changed in the state court's opinion, and that obviously the state court did *not* decide that the disputed franchise rights were not included in the sale under the statute; and also did *not* decide that the act of 1893 was in force when the act of 1894 was passed, *but expressly assumed the contrary*.

Counsel for defendant have further claimed that the state court expressly held that the city did not acquire its franchise rights from the plaintiff.

It should be noted that *the precise question at this point is*, not where or how the city acquired all its franchise rights, but *whether the plaintiff's disputed franchise rights were included in the sale provided by the act of 1894*.

As the Circuit Court also did not decide the point, and anticipating that defendants may here repeat the claim and argument presented by them below upon this point, we beg, out of abundant caution, to state and answer it here:

"*The State court expressly held that the city did not acquire its franchise rights from the plaintiff*. The court discussed this question, and declared its conclusion in these words: 'It is plain that when once the purchase was made, *the Act of 1894 conferred upon the city directly, and not merely or at all as successor to the water company, the right to supply itself and its inhabitants with water*, as if under the act of 1893 in case the water company had not offered to sell

under that act. A similar answer may be made with regard to the right to charge water rates. "It is the statute, and not the company which originally constructed the [water works], which confers upon the local authority this right,"' citing to this proposition *Edinburgh Street Tramways Co.* v. *Edinburgh* (1894), A.C. 456, 464, 465. (Record, pp. 68, 69.)

"This decision of the State court, upon this question of the construction of the statute, will be taken as conclusive by the Federal courts."

Respondent's Brief on Hearing of the Merits, pp. 42, 43.

We submit to the inspection of the court that the language quoted does not sustain the defendant's claim.

We can find no language there holding that the City "did not *acquire*" its franchise rights from the plaintiff.

It should be noted that in the earlier part of the opinion the state court said, "there was much discussion whether these are among the 'rights' which the city buys under Sect. 1 of the act," and later said, ". . . We do not think it necessary to go into these considerations," etc. (R. 53, 54.)

What, then, did the state court mean in saying, "assuming that the act of 1893 was not in force, . . . still it is plain that *when once the purchase was made*, the act of 1894 conferred upon the City directly, . . . the right to supply itself and its inhabitants with water"? etc.

Construing the various parts of the opinion together, does not the state court say, in effect, *We do not need to decide, and do not decide*, whether or not the plaintiff's franchise rights were included in the sale under the statute? Whether they were included or not, and even if they were, yet *after the City purchased them* it could only *use* them under the statute of 1894 with all the implications that statute carried concerning the act of 1893.

Wherefore we claim and submit it is clear that the state court did *not* decide, expressly or otherwise, that the plaintiff's franchise rights were not included in the sale under the statute.

As the state court did not decide that the plaintiff's franchise rights were not included in the sale, it follows that any claim made by defendant that the present court is bound by any such [non-existent] decision, cannot be sustained.

Under the rule laid down by the present court it is the right and duty of the present court to construe these two state statutes upon the points not necessarily involved in the actual decision of the state court, whatever opinions may have been expressed thereon in the opinions of the state court and the Circuit Court.

See *Carroll* v. *Lessee of Carroll*, 16 How. 275, at pages 286, 287.
St. Louis R.R. v. *Terre Haute R.R.*, 145 U.S. 393, at pages 403, 404.
Pollock v. *Farmers' Loan & Trust Co.*, 157 U.S. 429, at page 575.

(b) The City's other ground for claiming that plaintiff's franchise rights were not included in the sale is that the City had already received a complete water franchise by the act of 1893 and was in possession of it thereunder when the act of 1894 was passed.*

Plaintiff claims the contrary.

Even if the City had other franchise rights, obviously that fact would furnish no reason for not paying the vendor Water Company wholly or partly for similar rights bought from it.

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* This point is not involved in the Gloucester case, as the only statute purporting to authorize municipal competition is the same statute which provides for the sale.

Moreover, the contest between the parties in the legislature is to be remembered; and we submit that the act of 1894 was obviously a novel * attempt to obtain the whole of plaintiff's property without paying for that part of plaintiff's property which had come from the state, to wit, these franchise rights.

At all events the statutory terms, "*all the rights, privileges*," etc. (sec. 1, R. 33), naturally and necessarily include these disputed franchise rights.

Neither the state court nor the Circuit Court has held or intimated otherwise.

To cut these franchises out of the broad terms which, in both the ordinary and technical use of language, include them, can only be done upon the highest, clearest, and most extraordinary grounds, none of which have been yet presented.

Nevertheless, — and again out of abundant caution, — in view of the possibility that the present court might consider the existence of a complete water franchise under the act of 1893 a reason for excluding the disputed franchise from the sale under the act of 1894, we beg to show —

That the act of 1893 became void by the City's vote thereunder not to purchase; and so was not in force when

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* Note that in the Gloucester case herewith argued the bill contains the following: —

"21. Plaintiff *further avers upon information and belief*

"(*a*) That the said act of 1895 (chap. 451) was *novel;* that *the only act at all resembling it* in the terms of the so-called 'sale' was the Massachusetts act of *1894* (chap. 474) the effect and constitutionality of which are still in litigation." (Gl. R. 17.)

The allegation was made as bearing on the question of laches.

the act of 1894 was passed, but that the act of 1893 was re-enacted by the act of 1894 and as modified thereby.

The language of the act of 1893, sec. 12, provides that the Water Company may notify the City, within sixty days after the passage of the act, of its desire to sell to the City its property; "provided, however, the legal voters of the City . . . *vote to purchase* the aforesaid property," etc.

Section 13 of the same act provided that —

> "after the vote provided for in section 12 of this act, or provided the . . . Water Company does not so notify the said mayor within sixty days, this act shall be submitted to the legal voters of the city . . . for their acceptance or rejection," etc.
>
> Acts of 1893, c. 471, secs. 12, 13. (R. 31.)

The City first proceeded to vote upon the question of purchase, and voted *not* to purchase, and then voted to accept the act; and thereafter, claiming to act under the authority of said act, employed an engineer to make surveys in reference to the establishment of an independent water supply. (R. 5, 90.)

The Water Company claims that the proper construction of sections 12 and 13 of the act of 1893 requires that an *affirmative* vote "to purchase" be held a condition precedent to the City's right to accept the act and to acquire the powers conferred thereunder.

The language is plain and needs no interpretation, and it is therefore unnecessary to inquire into the objects of the legislature in the enactment of the statute.

> *Ruggles* v. *Illinois*, 108 U.S. 526, at page 534.
> *Lake County* v. *Rollins*, 130 U.S. 662, 669, 670, 671.
>
> *Bate Refrigerating Co.* v. *Sulsberger*, 157 U.S. 1, 36, 37, 38:

At pages 36, 37: "In our judgment the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly
*37 regarded as indicating a purpose to change *the law by judicial action based upon some supposed policy of Congress. But, as declared in *Hadden* v. *Collector*, 5 Wall. 107, 111, 'what is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.' 'Where the language of the act is explicit,' this court has said, 'there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the legislature. . . . It is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions.' *Scott* v. *Reid*, 10 Pet. 524, 527."

. . . "If the statute thus construed does not give to the inventor all the benefits he would like to have, the remedy is with another department of the government, and it is not for the courts to tamper with the words of a statute or, by a strained construction of
*38 *legislative enactments, the language of which is clear and explicit, to accomplish results not contemplated by Congress. This court, speaking by Chief Justice MARSHALL, in *United States* v. *Fisher*, 2 Cranch, 358, 385, said that where the meaning of the legislature was plain 'it must be obeyed.'"

See also —

Osborn v. *United States Bank*, 9 Wheat. at page *817.

The vote required by the language of section 12 was not a vote *upon the question* of whether the company would or would not purchase, but a " vote *to purchase* the aforesaid property."

We submit that there is no ambiguity in this language, and that it means, and can mean, only what it says, — that the requirement of the statute at this point was that " the legal voters of the City vote *to purchase;* " and further, that it was only *after* such an *affirmative* vote to purchase, or, in the words of the statute, " *after* the vote . . . provided for in section 12 of this act, or provided the . . . Water Company does not so notify the said mayor within sixty days," of its desire to sell, — that the city was authorized by section 13 *to vote at all upon the question of the acceptance of the act.*

If, however, other matters are to be considered in settling the construction of these sections, the following should be noted : —

1. That section 12 does not say that the question of whether the City shall purchase the property of the Water Company or not shall be submitted to the voters of the City, but unequivocally says " shall . . . vote to purchase," while in providing for the subsequent vote upon the acceptance the words of section 13 are that " this act shall be submitted to the legal voters . . . *for their acceptance or rejection*," and, lower down, provides a form of question to be voted upon.

Is not this the clearest possible indication that the legislature would have provided corresponding forms upon the question of purchase if the vote intended by section 12 had been a vote UPON THE QUESTION *of purchase, instead of the required affirmative vote to purchase?*

2. That the act of 1893 gave to the City different and additional sources of water supply than those possessed by

the Company, and also obviously the use of different streets and ways.

This will be seen at a glance by comparing section 2 of the act of 1880 (R. 19) with section 2 of the act of 1893. (R. 28.)

3. That the City *tried* to get the legislature to grant the City a water franchise without any requirement of purchase of the Water Company, but the Water Company, though not able to prevent the City's securing the desired franchise, *did* succeed in getting the provision from the legislature that the City should *not* have the franchise and rights it desired *unless* it should *first* buy out the Water Company upon the terms contained in its charter. In other words, the provisions of sections 12 and 13 of the act were inserted at the instigation of, and thus for the benefit of, the Water Company.

4. That the results of competition by the city without purchasing the Water Company's property must necessarily have caused the ruin of the Water Company.

That such municipal competition will effect the inevitable impairment or practical destruction of the local private company has been judicially noticed.

See *Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. p. 11.

Gloucester Water Supply Co. v. *City of Gloucester*, 179 Mass. 365.

White v. *City of Meadville*, 177 Pa. St. at page 651.

Westerly Water Works v. *Westerly*, 75 Fed. Rep. 181.

Ziegler v. *Chapin, Mayor etc.*, 126 N.Y. 342.

And in fact the proposition was expressly admitted by the City to the legislature in the legislative contest resulting in the two acts involved herein.

See admissions of the mayor before the legislative committee. Stipulation, par. (*g*), (R. 91) and Exhibit (R. 93).

And in considering this very act the state court said,—

"Of course an offer by a water company, made under the threat of municipal competition and TO AVOID RUIN, might be voluntary only in name." (R. 54.)

We submit that the fact that the obvious result of municipal competition would be the ruin of the Company shows the absurdity of the City's contention that the "vote to purchase" under the act of 1893 might be fulfilled by a vote *not* to purchase, — a vote which would obviously destroy the Water Company, *unless it sold* to the City at the City's own price, *however inadequate that might be.*

5. That although the Water Company's petition assumed (R. 32) that the City's claim — that the act of 1893 was existing and in effect, and not void — *might* be sustained, and although the City claimed that the act of 1894 recognized the existence and validity of the act of 1893, neither of these facts, even if proved, can determine whether the act of 1893 was then existing and in effect, or was void; for —

The question of the existence of a law is not a legislative, but a judicial, question.

"The legislature cannot authoritatively declare what the law is or has been; that is a *judicial* function and appertains to the courts. The legislature has exclusively the power to make laws, and thus declare what the law *shall* be."

Sutherland on Statutory Construction, sec. 229, and numerous cases cited.

"The question as to the existence of a law is a *judicial* one and must be so regarded by the Courts of the United States," —

even if the state court declines to take the trouble to determine the existence of the law.

> *Town of Ottawa* v. *Perkins*, 94 U.S. at pages 268, 269.
>
> *Koshkonong* v. *Burton*, 104 U.S. 668, at pages 678, 679:
>
> "When counsel, in *Ogden* v. *Blackledge* (2 Cranch, 272, 277), announced that, to declare what *the law is, or has been*, is a judicial power, to declare what the law *shall be* is legislative, and that one of the fundamental principles of all our governments is that the legislative power shall be separate from the judicial, this court interrupted them with the observation that it was unnecessary to argue that point."

Plaintiff's Petition to the Legislature.

Although the Water Company claimed that the act of 1893 was void, as before shown, yet after the vote of acceptance of said act by the City the Company feared that the act *might* be held to have been legally accepted, and that its property would be damaged, ruined, and destroyed by the City's threatened action under the act, and so petitioned the legislature of 1894 for legislation which would protect the Company by requiring the City, before acquiring the rights provided for under the act of 1893, to purchase the franchise, property, and all rights and privileges of the Water Company.

This petition assumes, as we have said (see p. 103), that the act of 1893 *might* be considered as in existence and valid, but this assumption cannot determine the question, because that must be decided by *judicial* authority.

The same is true of any "legislative recognition of the existence and validity of the act of 1893," contained in the act of 1894.

We submit that *no statement in the act of 1894, even if affirmatively made (which it was not), as to whether or not the act of 1893 had taken effect and remained in existence up to the passage of the act of 1894, could be decisive of the question, or could give to the act of 1893, except as revived or re-enacted by the act of 1894, any force which the act of 1893 would not have had without such legislative declaration.*

We therefore submit that, upon the grounds above given, our claim as to the construction of the act of 1893 should be sustained; and that that act should be held to have become void upon the City's vote *not* to purchase, and that nothing contained in the Water Company's petition to the legislature, — Exhibit F (R. 32), — or in the act of 1894, c. 474, — Exhibit H (R. 33), — can have any weight in determining this question.

Wherefore we submit it results and remains that when the act of 1894 was passed the City of Newburyport did *not* possess a water franchise, and had *no* right to the use of the streets for the purposes of water supply, and *no* right to collect water rates; and that it is thus all the more clearly established that *these rights were included in the sale authorized by the act of 1894.*

The Circuit Court did not discuss or decide whether or not the disputed franchise rights were included in the statutory sale, and did not decide whether or not the act of 1893 became void by the vote not to purchase.

It remains to be noted that, while the Circuit Court did not decide whether or not the act of 1893 became void by the vote, it showed a tendency to adopt the construction claimed by defendant. Its opinion upon the point is as follows: —

> "The plaintiff contends that the *taking* in this case was wholly under the act of 1894, and that the act of 1893 never took effect, because the 'vote to purchase'

> the company's works, under section 12 of the act, was a condition precedent to the city's right to vote to supply itself and its inhabitants with water under section 13; and the city having voted not to purchase, the act failed, and, consequently, the subsequent vote by the city to accept the provisions of the act was nugatory. This construction seems contrary to the intent and purpose of the act. The natural and reasonable construction of sections 12 and 13, looking at the whole act, is that the city should first decide whether it would purchase the plaintiff's works before determining whether it would build works of its own. *For the purpose of our present inquiry, however, it is unnecessary to pass upon this question.*" (R. 120.)

We submit that obviously the point was not fully considered by the court, and that the admitted *dictum* contained in the above quotation is controlled by the grounds and authorities we have presented above.

These rights of the Company were franchises and were thus the property of the Water Company.

Boston &c. v. *Salem &c.*, 2 Gray, at page 35, and cases cited.

See also *Williston Seminary* v. *County Commissioners*, 147 Mass. at page 430.

Monongahela Navigation Co. v. *United States*, 148 U.S. at pages 327, 328.

Wherefore we submit we have shown that the sale (which we shall show to be compulsory) included the Water Company's right to the use of the streets in supplying water and to collect rates; in short, all its franchise rights except its right to be a corporation, and the act of 1894 (c. 474) provided that the sale and deed from the Water Company to the City should comprise the same, and

that such rights — franchises — were the property of the Water Company.

3. The sale provided by the statute included something not required by law, that is, it included franchise rights belonging to the Company, which, under the terms of the sale, though included therein, were not to be paid for. Such a sale could not be required by law.

We have shown in the preceding subdivision of this point that, under the statute, the sale included the franchise rights to the use of the streets, and to collect water rates. [And [redacted] that the deed of the Company included these specifically, see par. 26, R. 50.]

No compensation was made or secured by the statute to the Water Company for a valuable part of the property included in the sale, viz., the right to the use of the streets and to collect water rates.

This appears from the decision of the Massachusetts Supreme Court. (R. 53, 54.)

The commissioners excluded these franchise rights from valuation, and the award did not contain any compensation whatever for such rights.

> "Sect. 1, chap. 474, in terms directs us to put a fair value upon the property for the purposes of its use by the city, and further provides that this value shall not be enhanced on account of the future earning capacity or good will, or the franchise of the company. To determine the fair value of the property for the purpose of its use by the city, as to any part that had any value in use to the city, we have valued the same at its value for that use at the time of the transfer. We have, as we think the statute so directs us, excluded from consideration the future earning

capacity and good will of the plant, *and have not valued any franchise right whatever which the company owned or held at the time of the transfer, except its rights to take water* as required and exercised by the taking under sect. 2, chap. 235, Acts of 1880. Neither have we, for the same reason, taken into consideration the earning capacity, whether past, present or future, or any income which the company had or might have derived from its plant." . . . (R. 9, 10).

. . . "'Our estimation of the value of the property, however, is based upon the theory that, *whether or not the company vested everything in the city*, described in clause 2, we still remain of the opinion that the elements of valuation which we have already therein stated are all that we can take into consideration in making our award, and we have therefore confined ourselves strictly to these elements of valuation, and do not include anything else. Upon the petitioner's request, we further add that, at the time of the transfer, the company, acting under chapter 235, Acts of 1880, had, since 1881, laid down in the streets of the city of Newburyport many miles of its piping, its hydrants, and other appliances used in connection with the water plant.

"'In estimating the value of the property transferred we allowed for the cost of reproducing this piping, these hydrants, and other appliances, as appears in clause 1 of our elements of valuation; *but we have not, in that element or in any other of the elements of valuation, taken into consideration or valued the exercise of this right, or the right itself, to so use the streets up to the time of the transfer;* and whether or not we should so value we leave to the determination of the court, further stating that upon the evidence presented to us, the exercise of this right and the right

itself was valuable.' (Report of Commissioners, pages 13–15.)" (R. 12.)

The commissioners' award was accepted by the highest court of Massachusetts (R. 56), although the opinion shows that "The chief complaint of the petitioner is that no allowance is made for its right to lay and maintain pipes in the streets and its rights to collect water rates." (R. 53.)

Wherefore it results that no compensation was made or secured by the statute to the Water Company for a valuable part of the property included in the sale, viz., the right to the use of the streets and to collect water rates.

In short, the statute provided that the Water Company should sell and convey its franchise rights to the City without receiving any compensation therefor.

That there is and can be no law requiring the Company to do this goes without saying.

On the contrary, the right to just compensation for private property is at the very foundation of our jurisprudence; and the sacredness of this right has caused the United States Supreme Court to read into, and make part of, the phrase "due process of law" in the Fourteenth Amendment, the provision requiring compensation for private property taken for public use. (See *ante*, Point I.)

Wherefore we submit it is established that the sale provided by the statute included something not required by law; that is, it included franchise rights belonging to the Company, which under the terms of the sale, though included therein, were not to be paid for. Such a sale could not be required by law.

Summary of the Foregoing.

We are now prepared to bring together these elements of the statute as it should be construed, and has been construed, and to show therefrom its effect.

We have shown that we are entitled to go behind the form of the statute and to show what it was in substance and effect.

We have shown that questions of duress are likewise to be determined not merely upon the form of the language used, but upon what was said or done *in effect*.

In order, then, to show what the statute was *in effect* we have shown further as follows: —

1. The municipal competition authorized by the statute meant serious loss to the Company, to wit, its inevitable damage and ruin.

2. The statute (1894, c. 474) provided that the sale from the Water Company to the City should comprise the Water Company's franchise rights (1) to the use of the streets in supplying water, and (2) to collect water rates.

[Hereunder — that the act of 1893 became void by the City's vote not to purchase under that act.]

Such rights — franchises — were the property of the Water Company.

3. The sale provided by the statute included something not required by law; that is, it included franchise rights belonging to the Company which, under the terms of the sale, though included therein, were not to be paid for. Such a sale could not be required by law.

Wherefore we submit that the authorization in the statute of municipal competition conditioned upon the Company's making such sale, which could not be required by law, was in effect that the government, the Commonwealth of Massachusetts, by the act of 1894, threatened the plaintiff with serious loss unless the plaintiff would, by an apparently voluntary sale and contract, do something not required by law.

That such statutory declaration of impending loss or ruin may be properly termed a threat is indicated by the lan-

guage of the Massachusetts court in the dictum already referred to.

> "Of course, an offer by a Water Company, made under the THREAT *of municipal competition and to avoid ruin*, might be voluntary only in name." (R. 54.)

The Circuit Court's reasoning at the crucial point is a holding in effect that the authorization of municipal competition was a *threat*.

> "But if competition be lawful, *threatened* competition is *lawful*. And if it were lawful for the State to authorize municipal competition, it was not unlawful for it to *threaten* to authorize municipal competition." (R. 123.)
>
> "But what was the compulsion in this case? It was the compulsion arising from the fear of competition, produced by what is termed the *threat* of the State to authorize municipal competition." (R. 123.)

And this is in accordance with the ordinary use of language. The primary meaning of threat is *pressure*. Its derived and present meaning is a *menace*. (Century Dictionary.) And by the same authority, a menace is "Threat or threatened; the declaration or indication . . . of a probable evil to come." (Century Dictionary.)

Duress by Submission to Choice of Evils.

Moreover, under the decisions of the present court, duress may be caused by a declaration of a probable or a certain evil to come, giving to the party threatened a *choice of evils*.

A submission "merely as a choice of evils" was held in—

> *Robertson* v. *Frank Brothers Co.*, 132 U.S. 17, at page 22, —

not to destroy the involuntary character of the act.

Coercion is intensified when the greater evil is that, unless the party submits, he must "discontinue the business," which is certainly the case where the corporation will inevitably be ruined. (Ibid. p. 23.)

B.

The plaintiff made the sale under the influence of such threat.

Having shown that the statute was in effect a threat of ruin to the plaintiff company, we submit that, under the decisions cited *ante* (under subdivision I. of this point, pp. 89 *et seq.*), it would have been unnecessary to put in any evidence whatever to show that the Water Company was influenced to make the sale by the statutory threat of municipal competition, which meant not only the Company's ruin, but also, — as indicated in the state court's opinion in the Gloucester case (Gl. R. 85), — *the practical confiscation* of its property.

We did, however, put in, under stipulation, the following: —

> "That the stockholders of the plaintiff Company voted to offer, sell and convey the Company's property to the defendant city, as set forth in paragraph 9 of the bill, *because of their belief that the city of Newburyport was liable to compete with the Water Company, and because they believed that such competition would ruin the Company.*" (R. 91.)

No attempt was made by the defendant to introduce any opposing evidence.

The conclusion of the Circuit Court that the sale, under the statutory threat of municipal competition, was compulsory in fact (R. 123), was thus inevitable.

C.

The sale became thereby compulsory in law.

For we submit it is established, under Point V., —

While ordinarily what may be lawfully done may be lawfully threatened, yet if the government, or an officer of the government acting under color of office, threatens an individual with serious loss, unless the individual will make a contract to do something not required by law, and if the contract is made under the influence of such threat, such contract, though voluntary in appearance, becomes thereby compulsory in fact and in law and is obtained by duress.

Conclusion of this Point.

And we submit that under the present point we have established all the above essentials of legal compulsion or duress: to wit, —

A.

The government, that is, in this case, the Commonwealth of Massachusetts, by the act of 1894 (c. 474), in effect threatened the plaintiff with serious loss unless the plaintiff would by an apparently voluntary sale and contract do something not required by law.

B.

The plaintiff, under the influence of such threat, did what was required as above, to wit, made the apparently voluntary sale provided for in the act of 1894, which sale included the disputed franchise rights, for which plaintiff receives no compensation.

We submit it follows, as a necessary conclusion, that —

C.

The sale became thereby compulsory in law.

We submit it likewise follows that we have established and sustained the third, fourth, and fifth assignments of errors, which are as follows: —

"III.

The court erred in this:

That, although it held that the sale of the company's property was compulsory in fact, it held that such sale was not compulsory in law.

IV.

The court erred in this:

That it did not hold that the act of 1894 (including the act of 1893 as re-enacted by the act of 1894,) was compulsory in law as well as in fact, and constituted duress.

The said act of 1894 is chapter 474 of the Massachusetts Acts of 1894; and the said act of 1893 is chapter 471 of the Massachusetts Acts of 1893.

V.

The court erred in this:

That it held 'that the threatened grant of such a franchise under the act of 1894 (admitting this to be the effect of the act) was a lawful exercise of legislative power.'" (R. 132.)

Anticipated Defences to the Foregoing.

The entire argument up to this point is based upon the assumption that plaintiff's franchise rights were not exclusive, and that it would therefore have been lawful for the state to have granted to the City competing water franchise rights *without more*.

While the passing of such an act, to go into effect at a later date, might have been in effect a threat of municipal competition, it would have been coupled with no exaction. It might then have come under the general rule, "*ordinarily* what you may do without liability, you may threaten to do without liability."

Silsbee v. *Webber*, 171 Mass. at page 381 (see *ante*, p. 71).

Obviously many more decisions can be found under the general rule than under the qualification under it which we have shown in point V. (*ante*, p. 68), as exemplified in the Tingey case and the cases following it.

We respectfully ask that, in examining any authorities which may be cited against us, the court may carefully note and preserve the distinction.

Some of the cases hitherto cited by the defendant against us, while on the surface having the appearance of contradicting our claims and conclusions, will be found, upon close examination, to contain elements distinguishing them from the authorities cited by us and from the present case.

We therefore beg to add here an —

Examination of cases heretofore cited by defendant upon duress, in anticipation that the same cases may be cited again.

French v. *Shoemaker*, 14 Wall. 314, 331:

It is enough to show that in this case the party complaining of the duress "accepted the advance of $5000 and the shares assigned him in the new organization as proposed." (Ibid. at page 333.)

If we had accepted the $275,000 awarded for part of our property, even under *Moore* v. *Sanford*, 151 Mass. 285 we should be deemed to have conclusively accepted the act.

The receipt and retention of the consideration conclusively distinguishes *French* v. *Shoemaker* from the present case.

The same may be said of respondent's citation —

United States v. *Huckabee*, 16 Wall. 413, 431:

In that case the vendors had accepted and kept the consideration, to wit, $600,000. (Ibid. p. 429.) Moreover, Huckabee had told Lyon he thought the title was good.

This was when Lyon proposed to buy, and asked if the title was good.

Again we say that if we had accepted the $275,000, or if the City had sold to somebody else, who, when proposing to buy, had asked us if the title was good, and if we had replied in the affirmative, we should certainly not be permitted to set up duress. Each of these two facts distinguishes clearly *United States* v. *Huckabee* from the present case.

Silliman v. *United States*, 101 U.S. 465:

In that case also, Silliman "thereafter, from time to time, received, without protest or objection, *payment* according to the diminished rate, and then brought suit against the United States for the difference between it and the original rate." (See headnote.)

This brings the Silliman case under the same distinction as the preceding. We certainly do not believe that if we had received and accepted the $275,000, any court would allow us to recover the difference between that and the value of our entire property as claimed hereunder.

Thorn Wire Co. v. *Washburn & Moen*, 159 U.S. 423, 444:

In that case, the complainant "preferred for prudential reasons to receive money and an acquittance of claims." (Ibid. p. 444.) That case is therefore likewise distinguished from the present case.

Respondent also cited —

White v. *United States*, 154 U.S. 661, 663:

This case is imperfectly reported, being in the "Appendix." It seems, however, from page 663, that the rights of a *third party* were involved, and that the plaintiff was trying to recover from the United States money paid to the *third* person, but it was the *third* person who had made the

claim, and not the United States. (Ibid. p. 663.) That case, therefore, we submit, furnishes no precedent for the present case.

Respondent also cited —

Carver v. *United States*, 111 U.S. 609:

In that case the person who claimed to have suffered duress agreed subsequently that what the government coerced him to pay was in fact fairly due upon a proper settlement of his accounts; and by way of supplement to, and in execution of, that agreement he accepted, as compensation for his services, or as a gratuity, a portion of the balance justly due from him. (Ibid. p. 612.)

We submit that those facts furnish no argument for lack of duress or for estoppel in the present case. The plaintiff in the present case has never agreed that the government had a right to make the plaintiff deed all its property and receive in payment therefor the value of only part of the property. Nor has the plaintiff received or accepted from the government or the City anything in payment therefor.

Lane & Bodley Co. v. *Locke*, 150 U.S. 193, 200, 201:

In that case the person claiming duress continued "amicable relations" for eight years "before he made a hostile move."

The court said, —

> . . . "The '*amicable relations*' he desired to have continued were evidently those out of which he was receiving a salary of $2000 per annum — a sum larger than he would have been entitled to if he had been in receipt of a royalty.
>
> "Courts of equity, it has often been said, will not assist one who has slept upon his rights, and shows no excuse for his laches in asserting them. The plain-

> tiff's excuse, in this instance, that he preferred for prudential reasons, to receive a salary from the defendant rather than to demand a royalty, is entitled to a less favorable consideration by a court of equity than if his conduct had been that of mere inaction."
>
> Ibid. p. 201.

In the present case plaintiff has had no "amicable relations" with the defendant since the legislative contest was first begun by the City's attempt to secure the right to municipal competition.

Under point XIV. we have shown that from the time of the passage of the act plaintiff has claimed that it was entitled to compensation for its franchise rights.

The state court said, —

> "The chief complaint of the petitioner is that no allowance is made for its right to lay and maintain pipes in the streets and its right to collect water rates." (R. 53.)

Under the law of Massachusetts, as laid down by *Moore* v. *Sanford*, 151 Mass. 285, the plaintiff's resort to the state court under the act did not take away plaintiff's right to question the constitutionality of the act in another and independent proceeding. As we show in point XIV. *post*, if a state court had held that under the act all of plaintiff's property was to be paid for, the act would have been constitutional, although the sale would still have been compulsory. For a compulsory sale with full, that is, just compensation, is the equivalent of a constitutional taking. (See *post*, Point IX.) As soon as the state court decided that the franchise rights were not to be paid for plaintiff brought its present bill.

Wherefore we submit that the inconsistent amicable relations which were made the basis of estoppel in *Lane & Bodley Co.* v. *Locke*, have not existed in the present case.

Respondent also cited —

White v. *United States*, 154 U.S. 661, 663:

It involved the rights of a third party, and we submit to the inspection of the court that it furnishes no authority for the present case.

VII.

THAT THE COMPANY GAVE A DEED WHICH WAS VOLUNTARY IN FORM IS IMMATERIAL. THE SALE REMAINS COMPULSORY IN FACT AND IN LAW.

Baker v. *Morton*, 12 Wall. 150:

A deed was given which was obviously voluntary in form; yet under the principles we have quoted and invoked herein it was held to have been compulsory, and the compulsion having been exerted by an individual, a federal court of equity avoided the deed for duress.

In —

Swift Co. v. *United States*, 111 U.S. 22, —

although the payments which were claimed to be compulsory had been accompanied with writings containing statements that they were "correct, complete, and true," signed by the party who tried to avoid them, yet upon the principles herein quoted and invoked the payments were still held to be compulsory.

In —

Robertson v. *Frank Bros. Co.*, 132 U.S. 17, —

it was claimed —

> "that the payment of the duties complained of was a *voluntary* payment, inasmuch as the plaintiffs themselves made the additions to the entries and invoices, and that, therefore, they cannot recover back any part of the money so paid."

Yet the court held that, notwithstanding these apparently voluntary writings by the party alleging compulsion, the payments were compulsory in law and in fact.

Upon this point the court said as follows: —

> "It is true that the thing done under compulsion in this case was the insertion of the additional charges upon the entries and invoices, but *that* NECESSARILY INVOLVED *the payment of the increased duties caused thereby*, and in effect amounts to the same thing as an involuntary payment." (Ibid. p. 24.)

It is to be noted that the court holds in effect that *whatever is involved in the act required by the compulsion is treated as part of that which is compulsory*. From which it follows that the Company's vote, offer, and deed, and delivery of the property thereunder, — being all statutory essentials of the sale, — are all to be regarded as compulsory in fact and in law.

VIII.

SUCH SALE (WHICH WAS COMPULSORY IN LAW) WAS FOR A PUBLIC USE OF THE PROPERTY.

That the sale was for a *public use* of the property is not disputed, and it is likewise settled law.

> "Whenever public uses require, the government may appropriate any private property, on the payment of just compensation. *That the supply of water to a city is a* **public purpose** *cannot be doubted*, and hence the condemnation of a water supply system must be recognized as within the unquestioned limits of the power of eminent domain. It matters not to whom the water supply system belongs, individual or corporation, or what franchises are connected with it,

— all may be taken for **public uses** upon payment of just compensation."

Long Island Water Supply Co. v. *Brooklyn*, 166 U.S. at page 689.

Aside from the question of laches, it is immaterial for us to show that the property was taken by, or under the authority of, the state for a public purpose. If it had been taken for a private purpose the taking would be unconstitutional even if just compensation had been provided.

Missouri Pacific Railway Co. v. *Nebraska*, 164 U.S. 403, 417.

As, however, in the present case the taking was for an obviously public purpose, we show under the question of laches, point XIV.,* *post*, that, although plaintiff knew from the outset that the sale was compulsory, yet the plaintiff could not know that the compulsory sale was without just compensation until the state court construed the act that provided payment for only part of the property included in the sale.

IX.

By such compulsory sale plaintiff's property was taken.

Again we call attention to the fact that, in order to sustain our contention, we are not obliged to show that the property was technically taken. The language of the Fourteenth Amendment is, —

"Nor shall any State *deprive* any person of . . . property without due process of law."

If by such compulsory sale the plaintiff was deprived by the state of its property without its having been technically

* See post, 137-139.

taken from it, we have obviously sustained our constitutional claim. As a matter of fact, however, the courts have used the term "taken" as an obvious abbreviation of the otherwise necessary phrase — *has been deprived of its property*. We submit, however, that we have shown that plaintiff was deprived of its property by a sale which was compulsory in law, and which was in effect a taking of plaintiff's property.

That the sale was **compulsory in law** is shown *ante*, point VI.

THAT A "TAKING" FOR PUBLIC USE UNDER A STATUTE IS THE EQUIVALENT OF A "COMPULSORY PURCHASE" BY THE PUBLIC HAS BEEN DISTINCTLY HELD IN THE FOLLOWING MASSACHUSETTS DECISIONS: —

Parks v. *Boston*, 15 Pick. 198, at page 208.
Norcross v. *Cambridge*, 166 Mass. 508, at pages 511, 512.

In New Hampshire it is likewise held that a *taking* by eminent domain is the equivalent of a compulsory purchase.

In *Thompson* v. *Androscoggin River Improvement Co.*, 54 N.H. 545, the court said, at page 557, —

> "How, then, could R. acquire the right to pour the river upon Eaton's farm through a cut which it would be an unreasonable use of his own land for him to make? By a *purchase*, *voluntary* or *compulsory*. The public, exercising the public power of **compulsory purchase, otherwise called eminent domain, whereof compensation is an essential element,** could authorize him as a public agent, in his natural or in his artificial capacity, to TAKE as many of Eaton's rights of property as were necessary for a public use."

The above extract is taken from the quotation in Lewis on Eminent Domain, page 55, where the above case and the Eaton case are treated as leading cases.

See Lewis, at pages 48–56.

See also the following from Cooley on Constitutional Limitations (6th ed.) p. 691, and cases cited thereunder:

"COMPENSATION FOR PROPERTY TAKEN.

"It is a primary requisite, in the *appropriation* of lands for public purposes, that compensation shall be made therefor. . . . And this compensation must be pecuniary in its character, because it is in the nature of a payment for a *compulsory purchase*.*

Obviously the terms "appropriation" and "eminent domain" in the above quotation are used as the equivalent of "taking."

These terms are also used as equivalents in the following definition of eminent domain: —

"Eminent domain is the right power of a sovereign State to *appropriate* private property to particular uses, for the purpose of promoting the general wel-

* "The effect of the right of *eminent domain* against the individual 'amounts to nothing more than a power to OBLIGE *him to sell and convey* when the public necessities require it.' JOHNSON, J., in *Fletcher* v. *Peck*, 6 Cranch, 87, 145. And see *Bradshaw* v. *Rogers*, 20 Johns. 103, per SPENCER, Ch. J.; *People* v. *Mayor &c. of Brooklyn*, 4 N.Y. 419; *Carson* v. *Coleman*, 11 N.J. Eq. 106; *Young* v. *Harrison*, 6 Ga. 130; *United States* v. *Minnesota &c. R.R. Co.*, 1 Minn. 127; *Railroad Co.* v. *Ferris*, 26 Tex. 588; *Curran* v. *Shattuck*, 24 Cal. 427; *State* v. *Graves*, 19 Md. 351; *Weckler* v. *Chicago*, 61 Ill. 142, 147." . . .

fare. It embraces all cases where, by authority of the State and for the public good, the property of the individual is *taken*, without his consent, for the purpose of being devoted to some particular use, either by the State itself or by a corporation, public or private, or by a private citizen."

Lewis on Eminent Domain, sec. 1.

To the same effect see the opinion of JACKSON, J., in —

Scott et al. v. *Toledo*, 36 Fed. Rep. at page 394:

. . . "The exercise of the power of eminent domain is, in legal effect, *nothing more than an enforced sale*, for the public benefit, at a fair price, to be ascertained in some proper mode, and to be paid the owner for the property so appropriated."

This is the opinion which, more than any other, seems to have been relied on by the present court in —

Chicago, Burlington &c. R.R. v. *Chicago*, 166 U.S. 238, 239.

Wherefore we submit it is established that by such compulsory sale plaintiff's property was taken.

X.

THE PROPERTY OF PLAINTIFF WAS TAKEN UNDER COLOR OF THE AUTHORITY OF THE STATE OR COMMONWEALTH OF MASSACHUSETTS.

We have shown (*ante*, Points I.–VI.) that the sale was compulsory, and that the compulsion was effected under the said act by the legislature of Massachusetts of 1894, including the said act of 1893, as re-enacted by the act of 1894.

The following is from the opinion in —

Barnett v. *Denison*, 145 U.S. 139: —

"*It is the settled doctrine of this Court that municipal corporations are merely agents of the state government for local purposes*, and possess only such powers as are expressly given, or implied, because essential to carry into effect such as are expressly granted; 1 Dill. Mun. Corp. sec. 89; *Ottawa* v. *Carey*, 108 U.S. 110; that the bonds of such corporations are void unless there be express or implied authority to issue them; *Wells* v. *Supervisors*, 102 U.S. 625; *Claiborne County* v. *Brooks*, 111 U.S. 400; *Concord* v. *Robinson*, 121 U.S. 165; *Kelley* v. *Milan*, 127 U.S. 139." . . .

Although municipal corporations are agents of the state for local purposes, where such agent, under color of an unconstitutional statute, commits acts of ruin and injury to the rights and property of plaintiff acquired under a contract with the state, a suit may be maintained against such agent, and such a suit is not a suit against the state.

Pennoyer v. *McConnaughy*, 140 U.S. 1:

"The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and *under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State.* Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely minis-

terial — is not, within the meaning of the Eleventh Amendment, an action against the State. *Osborn* v. *Bank of the United States*, 9 Wheat. 738; *Davis* v. *Gray*, 16 Wall. 203; *Tomlinson* v. *Branch*, 15 Wall. 460; *Litchfield* v. *Webster County*, 101 U.S. 773; *Allen* v. *Baltimore & Ohio Railroad*, 114 U.S. 311; *Board of Liquidation* v. *McComb*, 92 U.S. 531; *Poindexter* v. *Greenhow*, 114 U.S. 270." (Ibid. p. 10.)

In such case —

"An unconstitutional law will be treated by the courts as null and void." (Ibid. pp. 13, 14.)

Where the act of an agent (for example, a board of commissioners) is authorized by a state statute, and it appears, "in essence and effect," that what is authorized by such act is a *taking* of private property for the *private use* of petitioners, **such taking is a taking by the state,** and if without the owner's consent is not due process of law, and is a violation of the Fourteenth Amendment.

Missouri Pacific Railway Co. v. *Nebraska*, 164 U.S. 403:

(Headnote:) "The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States.

"A statute of a State, by which, as construed by the Supreme Court of the State, *a board of transportation is* authorized to require a railroad corporation, which has permitted the erection of two elevators by private persons on its right of way at a station, to grant upon like terms and conditions a location upon that right of way to other private persons in the neighborhood for

the purpose of erecting thereon a third elevator, in which to store their grain from time to time, is a *taking* of private property of the railroad corporation for a private use, in violation of the Fourteenth Article of Amendment of the Constitution of the United States."

(From Statement of Facts, at page 403:) "This was a writ of error to review a judgment of the Supreme Court of the State of Nebraska, awarding a writ of mandamus to compel the Missouri Pacific Railway Company, a corporation of Nebraska, to comply with an order of the Nebraska State Board of Transportation, which directed the company to grant to John W. Hollenbeck and others, the right and privilege of erecting an elevator upon the grounds of the railway company at its station at Elmwood."

(From Opinion, at page 417:) "This court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion, that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was *in essence and effect*, a *taking* of private property of the railroad corporation, for the private use of the petitioners. *The taking by a State* of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States. *Wilkinson* v. *Leland*, 2 Pet. 627, 658; *Murray* v. *Hoboken Co.*, 18 How. 272, 276; *Loan Association* v. *Topeka*, 20 Wall. 655; *Davidson* v. *New Orleans*, 96 U.S. 97, 102; *Cole* v. *LaGrange*, 113 U.S. 1; *Fallbrook District* v. *Bradley*, *ante*, 112, 158, 161; *State* v. *Chicago, Milwaukee & St. Paul Railway*, 36 Minnesota, 402."

To same effect see —

Chicago &c. R.R. v. *Chicago*, 166 U.S. at page 239.

XI.

THE PLAINTIFF, A PRIVATE CORPORATION, IS A "PERSON" WITHIN THE FOURTEENTH AMENDMENT.

Minneapolis R.R. Co. v. *Herrick*, 127 U.S. 210.

Missouri Pac. Co. v. *Mackey*, 127 U.S. 205.

Minneapolis R.R. Co. v. *Beckwith*, 129 U.S. 26.

Charlotte &c. Co. v. *Gibbes*, 142 U.S. 386.

Lake Shore &c. Ry. Co. v. *Smith*, 173 U.S. 684, 690.

XII.

IT RESULTS FROM THE PRECEDING POINTS THAT THE PLAINTIFF HAS BEEN DEPRIVED OF ITS PROPERTY BY THE STATE OR COMMONWEALTH OF MASSACHUSETTS WITHOUT DUE PROCESS OF LAW.

THE ERRORS SPECIFIED IN THE FIRST, SECOND, SIXTH, AND TENTH ASSIGNMENTS OF ERROR (*post*, pp. 129, 130) ARE SHOWN; AND THE DECREE OF THE CIRCUIT COURT SHOULD BE REVERSED.

For we have shown —

1. *That the sale involved in the present suit, though voluntary in form as provided by the act of 1894, was* COMPULSORY (*ante*, Points I.–VI., this conclusion being reached in subdivision C of Point VI., *ante*, p. 113.)

2. *That the compulsory sale was for a* PUBLIC USE *of the property.* (See *ante*, Point VIII., p. 120.)

3. *That by such compulsory sale plaintiff's property was* TAKEN. (See *ante*, Point IX., p. 121.)

4. *That the property was taken under color of the authority of the state or commonwealth of Massachusetts under said act of the legislature of Massachusetts of 1894 including the act of 1893, as re-enacted by the act of 1894.* (See *ante*, Point X., p. 124.)

5. *That the taking is without just compensation, to wit, is without* ANY *compensation.* (See *ante*, Point VI., A 3, p. 107.)

6. *That under the Fourteenth Amendment "due process of law" requires compensation to be made or secured to the owner of private property taken for public use.* (See *ante*, Point I., p. 59.)

7. *That the plaintiff corporation is a "person" under the Fourteenth Amendment.* (See *ante*, Point XI., p. 128.)

8. *And finally that these constitute all the essentials required to establish our claim that the provisions of the act of 1894, relating to the sale and conveyance of the Water Company's right to the use of the streets and to collect water rates, are in violation of the Fourteenth Amendment.* (See Points I.–IV., *ante*, pp. 59–68.)

Wherefore we claim and submit it follows that the errors specified in the first, second, sixth, and tenth assignments of error are shown; and the decree of the Circuit Court should be reversed.

The said assignments of error are as follows: —

"I.

The court erred in this:

That it held, adjudged and decreed that the plaintiff has not been deprived of its property without due process of law in violation of the fourteenth amendment to the Constitution of the United States. (R. 131, 132.)

II.

The court erred in this:

That it held that the plaintiff failed to establish a taking of its property without just compensation under the authority of the State. (R. 132.)

VI.

The court erred in this:

That it did not find and hold that the act of 1894, (including the act of 1893 as re-enacted by said act of 1894) as construed by the highest court of Massachusetts in effect authorized a taking of plaintiff's property without just compensation; and that thereby and thereunder the State of Massachusetts deprived plaintiff of its property without just compensation in violation of the provision of the fourteenth amendment to the Constitution of the United States. The said act of 1894 is chapter 474 of the Massachusetts Acts of 1894; and the said act of 1893 is chapter 471 of the Massachusetts Acts of 1893. (R. 132.)

X.

The court erred in this:

That it ordered, adjudged and decreed that plaintiff's bill be dismissed with costs to the defendant." (R. 133.)

XIII.

THE PROVISIONS OF THE ACT OF 1894 (INCLUDING THE ACT OF 1893 AS RE-ENACTED BY THE ACT OF 1894) CONSTITUTE AN "ENTIRETY." THE PART OF THE ACT OF 1894 WHICH WE HAVE SHOWN TO BE UNCONSTITUTIONAL CANNOT BE SEPARATED FROM THE REMAINDER WITHOUT VIOLATING THE OBVIOUS INTENT OF THE STATUTE; THE ENTIRE ACT OF 1894 (INCLUDING THE ACT OF 1893 AS RE-ENACTED BY THE ACT OF 1894) IS THEREFORE UNCONSTITUTIONAL AND VOID.

As the City of Newburyport holds plaintiff's property under a statute which is unconstitutional and void, this court of equity should give such relief as is usually given to owners of property against other parties wrongfully in possession of the same.

In —

Louisville Water Co. v. *Clark*, 143 U.S. at page 16, —

the court determined, evidently upon inspection, that the act there under consideration "is to be regarded as an *entirety*."

The same thing was done as to the ordinance under consideration in —

Citizens' &c. Co. v. *City Ry. Co.*, 64 Fed. Rep. at page 656.

Moreover, it is of the very nature of the franchise rights involved that they be used *in connection with* the corporeal property embraced in the act.

We think this will be conceded by the City. At all events, we submit it is obvious that the entire act of 1894 (including the act of 1893 as re-enacted by the act of 1894) comprised an "entirety," "one entire scheme" of furnishing water to the City of Newburyport and its inhabitants, which cannot be separated into parts without violating the intent of the legislature.

Moreover, it is confirmed by the decision in —

People v. *O'Brien*, 111 N.Y. 1, at page 47.

Furthermore, the burden is upon the respondent to show that that which is clearly unconstitutional is separable from the rest of the statute under the principles laid down in the "Income Tax Case."

Pollock v. *Farmers Loan & Trust Co.*, 158 U.S. 601, and cases therein cited and quoted.

We are content to rely upon the following: —

"It is elementary that the same statute may be in part constitutional and in part unconstitutional, and *if the parts are* WHOLLY *independent of each other*, that which is constitutional may stand while that which is unconstitutional will be rejected. And in the case before us there is no question as to the validity of this act, except sections twenty-seven to thirty-seven, inclusive, which relate to the subject which has been under discussion; and as to them we think the rule laid down by Chief Justice SHAW in *Warren* v. *Charlestown*, 2 Gray, 84, is applicable, that if the different parts 'are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the Legislature intended them as a whole, and that, if all could not be carried into effect, the Legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them.' Or, as the point is put by Mr. Justice MATTHEWS in *Poindexter* v. *Greenhow*, 114 U.S. 270, 304: 'It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; *but these are cases where the parts are so* DISTINCTLY *separable that each can stand alone, and where the Court is able to see*, and to declare, *that the intention of the Legislature was that the part pronounced valid should be enforceable, even though the other part should fail.* To hold otherwise would be to substitute for the law intended by the Legislature one they may never have been willing by itself to enact.' And again, as stated by the same eminent judge in *Spraigue* v. *Thompson*, 118 U.S. 90, 95, where it was urged that certain

illegal exceptions in a section of a statute might be disregarded, but that the rest could stand: 'The insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the Legislature of Georgia, the statute is made to enact what confessedly the Legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions.'"

(Ibid. pp. 635, 636.)

In the Income Tax case the court applied the foregoing principles as follows: —

"*Third.* The tax imposed by sections twenty-seven to thirty-seven, inclusive, of the Act of 1894, so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and, therefore, unconstitutional and void because not apportioned according to representation, ALL *those sections, constituting one entire scheme of taxation, are necessarily invalid.*" (Ibid. p. 637.)

Connolly v. *Union Sewer Pipe Co.*, 184 U.S. 540, at page 565:

"The principles applicable to such a question are well settled by the adjudications of this court. If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative." . . .

It is to be noted that the bond in the Tingey case cov-

ered both what was permitted by law and what would have been legal if voluntarily given, but was not required by law. See:

United States v. *Tingey*, 5 Pet. at page 127.

It was held that the entire bond was given under duress and the government did not recover upon any part of it.

Wherefore we submit that we have established that the provisions of the act of 1894 (including the act of 1893 as re-enacted by the act of 1894) constitute an "entirety," and that the entire act of 1894 (including the act of 1893 as re-enacted by the act of 1894) is unconstitutional.

That an unconstitutional act is VOID, and protects nobody who has meddled with property under it, whether he be a private individual or an agent of the government, is elementary constitutional law.

Cooley's Constitutional Limitations (6th ed.) p. 222, and cases cited.

United States v. *Lee*, 106 U.S. 196, subdivision 3 of headnote; also pages 220–223.

Virginia Coupon Cases, 114 U.S. 270, at page 288.

Pennoyer v. *McConnaughy*; see *ante*, p. 125.

It follows from these decisions that, as the City of Newburyport holds plaintiff's property under a statute which is unconstitutional and void, this court of equity should give to plaintiff such relief as is usually given to owners of property against other parties wrongfully in possession of the same.

See Point XV., *post* 140.

XIV.

As to defendant's claim of laches.

We have already shown (*ante*, p. 57) that —

"Whether laches are such as will bar relief depends on circumstances of each case.

"*Bryan* v. *Kales*, 134 U.S. 135, 33 L. 829, Bk. XI. U.S. Notes, 923; *Griswold* v. *Hazard*, 141 U.S. 288, 35 L. 678, Bk. XII. U.S. Notes, 28; *Abraham* v. *Ordway*, 158 U.S. 420, 39 L. 1036, Bk. XII. U.S. Notes, 753."

Rose's United States Supreme Court Digest, vol. ii. p. 1185, par. (*e*).

We understand that the defendant does not make any claim as to plaintiff's lack of diligence in the period of time between the date of the state court's decision and the filing of plaintiff's bill. That decision was rendered June 14, 1897 (R. 53), and plaintiff's bill was filed July 21, 1897 (R. 129).

The defendant's claim upon this point is shown in the following quotation from its petition for rehearing on demurrer: —

"*The defendant did not urge or rely upon any laches after the proceedings in the State court and before the bringing of this bill.* It relied and still relies on the plaintiff's laches throughout the proceedings in the State court and during the entire period of two years preceding the bringing of the bill. It is plain that the question of the validity of the Massachusetts act of 1893 could have been raised by the plaintiff, by original proceeding in the State court, or in this court if it can now be raised here, prior to the passage of the act of 1894. It is equally plain that all the questions raised in the present bill, of the validity of the act of 1894 or of the act of 1893, could have been raised by the plaintiff by original bill in this court, if they can now be raised here, at any time after the passage of the act of 1894, and before the plaintiff began its proceedings in the State court. It is equally plain

that all questions of the constitutionality or validity of the valuation clause of section 1 of the act of 1894, which is the only part of the act complained of or involving any Federal question, could have been raised and availed of by the plaintiff in the proceedings which it actually brought in the State court, and a final adjudication of the Supreme Court of the United States obtained thereon in that proceeding. The laches relied on by the defendant is in omitting to raise any constitutional question throughout the whole course of that proceeding, and throughout the period of two years which it occupied, either in that or in this court, until that proceeding was terminated by an award of an amount unsatisfactory to the plaintiff." (R. 98.)

We beg to consider these claims *seriatim.*

As to defendant's claim "that the question of the validity of the Massachusetts act of 1893 could have been raised by the plaintiff, by original proceeding in the State court, or in this Court if it can now be raised here, prior to the passage of the Act of 1894."

We submit we do not need to answer why we did not go into court before the act of 1894 was passed, because we claim and show herein that it is under the act of 1894 alone that the sale was made which is the subject of the present litigation.

As to defendant's claim "that all the questions raised in the present bill, of the validity of the act of 1894 or of the act of 1893, could have been raised by the plaintiff by original bill in this court, if they can now be raised here, at any time after the passage of the act of 1894, and before the plaintiff began its proceedings in the State court."

It is to be borne in mind that "it is the rule of courts, both State and Federal, not to decide constitutional ques-

tions until the necessity for such decision arises in the record before the court."

Baker v. *Grice*, 169 U.S. 285, from headnote.

"It is matter of common concurrence — indeed, it is almost the undeviating rule of the courts, both State and Federal — not to decide constitutional questions until the necessity for such decision arises in the record before the court."

Ibid. p. 292.

If we had brought a bill in the Circuit Court before a decision under the petition was reached, would not the court have said, in effect, what was said in the railroad commission cases?

"*As yet the commissioners have done nothing.* There is, certainly, much they may do in regulating charges within the State, which will *not* be in conflict with the Constitution of the United States. *It is to be presumed they will always act within the limits of their constitutional authority. It will be time enough to consider what may be done to prevent it when they attempt to go beyond.*"

Railroad Commission Cases, 116 U.S. at page 335.

It is to be borne in mind that there were at least two essentials required in establishing our claim of unconstitutionality: —

1. That the sale was compulsory (in fact and in law); and —

2. That the statute did not provide payment for all the property comprised in the compulsory sale.

It may be assumed that we knew and could prove from the start that the sale was compulsory; but until the final

decision by the state court, we could not know that we should not receive payment under the statute for all the property comprised in the sale.

That the plaintiff contended for such construction is shown by the opinion of the state court. (R. 53.)

The act was *novel* as to the terms of payment. The commissioners construed it, as already shown, as not providing any payment for part of plaintiff's property; but at the same time they recognized the doubt and uncertainty of their conclusion by adding, —

> "Whether or not we should so value we leave to the determination of the court, further stating that, upon the evidence presented to us, the exercise of this right and the right itself was valuable." (R. 12.)

The report of the commissioners came before a single justice of the Supreme Court.

He recognized the novelty of the act and the doubtfulness of its construction by not rendering any decision at all and reserving the case for the full court. (R. 12.)

Suppose that the plaintiff had brought a bill in the Circuit Court alleging the unconstitutionality of the act of 1894 before the highest state court had rendered its decision.

Such bill could not have contained one of the averments essential to plaintiff's case, namely, that "under said act [as construed by the State court] said City was not bound to pay anything for the rights, and the exercise of rights, belonging to said Company, which said commissioners had found and reported to be valuable, but not included in said award of $275,000." (R. 13.)

We submit that obviously the Circuit Court would have held that the bill was prematurely brought; that it was entirely possible that the state court might decide, as was claimed therein by plaintiff, that these rights should be

paid for with the rest of the property; that if this were done, then the plaintiff would be paid in full for all its property even if the sale was compulsory in fact and in law. For the state had the right, under the Fourteenth Amendment to deprive plaintiff of its property or take its property in any form or guise, *provided* the plaintiff received therefor just compensation.

Plaintiff's bill, if thus brought, would have been therefore dismissed, either with or without prejudice, as prematurely brought. At all events, under *Baker* v. *Grice* and *Railroad Commission Cases* above cited, the Circuit Court could not possibly have held, before the decision of the state court, that that court would construe the statute in the way in which it did, and which alone furnishes us one of the essentials of our claim of unconstitutionality, namely, the lack of just compensation, indeed the lack of *all* compensation for plaintiff's valuable franchise rights.

Wherefore we submit that, in view of the special circumstances of the case, and under the decisions of the present court, we were entitled to wait, and that it was our duty to wait, until the state court decided whether or not the disputed franchises were to be paid for under the act. That we proceeded with due diligence as soon as the state court's decision was announced is not questioned.

Wherefore we submit that the defendant's claim of laches is not sustained.

As to defendant's claim that "It is equally plain that all questions of the constitutionality or validity of the valuation clause of section 1 of the act of 1894, which is the only part of the act complained of or involving any Federal question, could have been raised and availed of by the plaintiff in the proceedings which it actually brought in the State court, and a final adjudication of the Supreme Court of the United States obtained thereon in that proceeding." (R. 98.)

We submit that this claim is fully answered by the Circuit Court:

> " . . . The constitutional questions set out in this bill were not raised in the State court and could not have been drawn in question in that suit.
>
> *Moore* v. *Sanford*, 151 Mass. 285.
> *Pitkin* v. *Springfield*, 112 Mass. 509."
> (R. 111.)

We also object to defendant's above statement that we waited "until that proceeding [in the state court] was terminated by an award of an amount unsatisfactory to the plaintiff."

We have made no complaint as to the amount of the award for the property valued. Our complaint is that the compulsory sale included property for which the state court held that, under the statute, we were not entitled to any compensation, whether it was included in the sale or not.

Finally, we ask the court to note, not only that the present bill was promptly brought, but also that the court found and held as follows: —

> "The bill was brought before the suit in the State court was finally determined, and before the acceptance by the complainant of the award.
>
> *Moore* v. *Sanford, ubi supra.*" (R. 111.)

Wherefore we submit that the plaintiff was not guilty of laches.

XV.

THE SPECIFIC RELIEF WHICH MAY BE FINALLY GRANTED NEED NOT BE DETERMINED NOW. IT IS SUFFICIENT AT PRESENT TO SHOW THAT WE MAY BE ENTITLED TO ANY FINAL RELIEF IN RESPECT OF THE PROPERTY IN ISSUE. WE HAVE SHOWN THAT THE ENTIRE ACT OF 1894 IS UN-

CONSTITUTIONAL; THAT ALL ACTION THEREUNDER IS VOID. THE ENTIRE COMPULSORY SALE THEREUNDER WAS VOID. THE DEED THEREUNDER WAS OBTAINED BY COMPULSION. AND UNDER THE PRINCIPLES OF EQUITY WE ARE ENTITLED AT LEAST TO A CANCELLATION OF THE DEED AND A RESTORATION OF THE PROPERTY.

See —

Osborn v. *United States Bank*, 9 Wheat. star p. 738, at star pages 822, 823, 845.

That case involves constitutional questions mingled with other questions, and an injunction arising out of both classes of questions.

See also —

Baker v. *Morton*, 12 Wall. 150.

Story's Equity Jurisprudence (13th ed.) vol. i. note, pp. 28, 29; vol. ii. pp. 4–17; vol. ii. sec. 908.

That plaintiff may have prayed for too much, or even if plaintiff relies upon inconsistent positions for relief, does not leave him remediless in a court of equity where he has prayed, as here, for general relief.

See —

Citizens' Co. v. *City Ry. Co.*, 64 Fed. Rep. at page 658.

Tayloe v. *Merchants' Fire Ins. Co.*, 9 How. 390, p. 406.

Tyler v. *Savage*, 143 U.S. 79, at page 98.

That, in case of proper expenditure, if any, upon the property before suit is brought, the court may impose terms upon which plaintiff can retake the property.

See —

Allore v. *Jewell*, 94 U.S. 506, 512, 513.

Cheney v. *Gleason*, 125 Mass. 166, 177.

XVI.

AS THE SALE WAS COMPULSORY IN FACT AND IN LAW, THE STATUTE WAS IN VIOLATION OF THE FOURTEENTH AMENDMENT, EVEN IF THE FRANCHISE RIGHTS WERE NOT, UNDER THE STATUTE, INCLUDED IN THE SALE.

This was distinctly held by the Circuit Court; and if such holding be regarded as a *dictum*, we submit it is sustained by the reasoning and the decisions of this court cited in support of it.

> "At the outset, it may be observed, that if the plaintiff establish a *taking* of its property, under the acts of 1893 and 1894, it is clearly right in its contention that such taking was without just compensation. The act of 1894 provided that the valuation of the property should be 'the fair value of said property for the purpose of its use by said city,' and 'such value shall be estimated without enhancement on account of future earning capacity or good will, or on account of the franchise of said company.' A *taking* under an act providing such a method of compensation would be unconstitutional because without just compensation. It would be a taking 'without due process of law' in violation of the fourteenth amendment.
>
> "Where private property is taken for public uses, the legislature cannot fix the compensation, or determine in what it shall consist, or prescribe the rules and principles upon which it shall be computed. Lewis on Eminent Domain, sec. 461. When a taking has been ordered, the question of compensation is judicial, not legislative. The legislature cannot extinguish any part of such compensation, or in any manner 'interfere with the just powers and province of courts and juries to administer rights and justice.'
>
> "It is sufficient on this point to cite the language of the Supreme Court in two cases." (R. 114, 115.)

The Circuit Court then cited and quoted —

> *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 327.
>
> *Reagan* v. *Farmers Loan & Trust Co.*, 154 U.S. 409, 410. (R. 115, 116.)

We have limited our argument, thus far, under the Fourteenth Amendment, to the claim in respect to the franchise rights which we show were included, under the statute, in the sale, but for which no compensation was provided. The Circuit Court shows above that a like argument may be made in respect to the Company's future earning capacity and good-will, which were also included in the sale. If it be held that the future earning capacity is included in the valuation of the franchise, it is obvious that at least the Company's good-will was not taken into account under the statute, and yet was included in the general term *property* transferred in the sale under the statute. Moreover, this cannot be affected by the tedious question whether or not the act of 1893 became void when the City voted not to purchase. We submit that clearly the Company's good-will passed under the act; that it was property; that no compensation was provided for it, and that our entire argument up to this point may be applied to good-will as well as to the franchise rights, and that this forms a separate and independent ground, holding that plaintiff has been deprived by the state of its property, to wit, of its good-will, without just compensation, and in violation of the provisions of the Fourteenth Amendment above relied upon in regard to due process of law.

Our answers to the defences hitherto attempted under the Reserved Power and the Police Power follow more naturally after the argument under plaintiff's claim con-

cerning the obligation of contracts. As to the ***Reserved Power***, see ***post***, p. 211; and as to the ***Police Power***, see ***post***, p. 221.

The Argument concerning Plaintiff's Claim under the Clause of the Constitution relating to the Obligation of Contracts.

Plaintiff's bill, as amended, contained the following allegation: —

> "'(*c*) That said legislation, as construed and applied as aforesaid, impaired and impairs the obligation of contracts belonging to said company and to its stockholders, in violation of section 10 of article I of the Constitution of the United States, and the plaintiff's rights thereunder.'" (R. 56.)

Preliminary.

It will be remembered that plaintiff's claim under the Fourteenth Amendment was decided by the Circuit Court, not upon a full hearing of the case, but upon the special hearing limited to the determination of the single question "whether or not the plaintiff has been deprived of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States?" (R. 92.)

That question was decided against plaintiff by the court in the opinion of August 8, 1900. (R. 113.)

As that decision was only upon the single question under the Fourteenth Amendment, the plaintiff claimed the right to a further hearing upon its claim under the contract clause of the Constitution.

This right was conceded, and a special examiner was appointed January 10, 1901. (R. 130.)

March 22, 1901, the following stipulation was filed: —

"It is hereby agreed, if in the opinion of the court the testimony of the commissioners below referred to is competent evidence, is admissible at this stage of the case, and is material, that the commissioners appointed under Mass. St. of 1893, chap. 471, sect. 12, to value the property of the plaintiff company, if called as witnesses in this cause, would testify, without contradiction, that *they did not in fact value as part of said property the contract between the company and the city, of which a copy marked 'Exhibit D' is annexed to the plaintiff's bill, it being their opinion that the same in law could not be valued;* and it is also agreed that the same shall be dealt with in like manner as if said commissioners had so testified before the commissioner appointed by the court in this case, and as if said objections as to competency, materiality, and admissibility at this stage of the case had been duly taken before such commissioner and reserved for the consideration of the court; and it is also agreed that the petitioner at the hearing put the contract in evidence under objection; and that the commissioners viewed and examined the plant, two of them being engineers; and that evidence was submitted bearing upon the cost to the company of furnishing water, but no evidence of the quantity of water supplied to the city under the contract, nor any direct evidence of the cost of performing the contract or of its value to the company; that respondent's counsel in his closing argument asked petitioner's counsel if he waived the claim to have the contract valued, and the latter replied that he did not waive it and was not prepared to say what use he should make of it; that thereupon respondent's counsel proceeded to argue that the contract should not be valued; that

the petitioner's counsel in his closing argument mentioned the contract as one of the items of property which the company had parted with to the city, and urged, but not in this connection, that it was the duty of the commissioners to estimate the value of all the property of the company as one whole; and that in the proceedings in the State court upon the report of the commissioners the company made no claim that the contract should be or had not been valued, and raised no question concerning it.

"It is further agreed that all questions of relief shall await final determination of the question whether the plaintiff is entitled to any relief, unless the circuit court shall hold the evidence above recited to be admissible and material, and in view thereof shall decree that the plaintiff is entitled to relief, notwithstanding the decision rendered August 8, 1900." (R. 94.)

A hearing thereon was held May 22, 1901, before COLT and BROWN, JJ. (R. 130.)

The opinion, *per curiam*, was rendered January 21, 1902, and amended March 5, 1902. (R. 130, 131.) As amended, it appears R. 128.

The record prior to the filing of the stipulation showed, of course, the Water Company's contract with the City to furnish water for fire purposes, and the authority for making such contract. But the record did not clearly show that this contract had not been included in the valuation made by the commissioners and confirmed by the higher court in the state. The plaintiff's object was to show by testimony or by the stipulation that *the contract had not been valued in the award.*

This was upon the ground that in the Long Island case it was held that a contract is property, and, like any other property, may be taken for public use, but subject to the rule of just compensation.

"Second, a contract is property, and, like any other property, may be taken under condemnation proceedings for public use. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U.S. 650, 673. Its condemnation is *of course subject to the rule of just compensation.*" . . .

Long Island Water Supply Co. v. *Brooklyn*, 166 U.S. 685, at page 690.

Unless we showed to the court that the contract was not paid for under the award, it would obviously have been open to the court to hold that possibly it was included in what, under the award, was to be paid for; and that, as the state had the right to take the contract upon paying for it, we had failed to show any unconstitutionality in respect to the contract.

It will be noted that the stipulation presented the following preliminary questions: —

First, whether the testimony of the commissioners set forth in the stipulation was competent.

Second, whether the testimony of the commissioners was admissible at that stage of the case.

Third, whether the evidence offered by the plaintiff under the stipulation was material.

All these questions were presented fully to the Circuit Court, which first assumed that the testimony "could properly be offered at this stage of the case," but held that its admissibility then was a "question which we do not find it necessary to pass upon;" and later held that "after a full hearing upon the question of duress, this court has already decided that all the proceedings which took place under the act of 1894 were entered into voluntarily by the complainant in order to avoid great disaster arising from municipal competition. Our conclusion upon this point is

conclusive against the admission of the testimony offered by the plaintiff that the commissioners did not value the water contract." And thereupon the motion to enter the final decree was granted. (R. 128, 129.)

As the prior hearing was limited to the question under the Fourteenth Amendment, and as the Circuit Court itself conceded by its action that we were entitled to a hearing upon the question under the obligation of contracts, we submit that obviously we had a right to try fully all the material questions involved in the latter point; and that this could not be done without being permitted to show (as is done in the stipulation), that the contract for water for fire purposes was not to be paid for, although included in the sale. We think it will be apparent upon a reading of the *per curiam* opinion (R. 128, 129) that the Circuit Court simply rested upon its prior decision, and failed to distinguish and observe plaintiff's additional rights under the contract clause of the Constitution.

If the present court sustains our contention upon the Fourteenth Amendment, it may be unnecessary for it to consider our claim in reference to obligation of contracts; but if the court should deny our claim under the Fourteenth Amendment, *it becomes vitally important that the present point receive full and careful consideration.* We therefore beg to present here substantially the argument, with some alterations and additions, which was presented to the Circuit Court upon this constitutional claim, and which was obviously not considered by that court.

THE CONTRACT TO SUPPLY THE CITY OF NEWBURYPORT WITH WATER FOR FIRE PURPOSES.

The act of 1880, incorporating the plaintiff Company, authorized the City of Newburyport to contract for a supply of water for fire purposes for a term of years with the Newburyport Water Company. (Section 8 of chapter 235 of acts of 1880, R. 20.)

"Under date of Aug. 17, 1880, a contract was made, in accordance with the provisions of Section 8 of said Act of 1880 (Chapter 235)." (Bill, par. 4, R. 2.)

The answer "admits the establishment of a water system, and the making of the contract annexed to the bill as Exhibit D." (R. 60.)

A copy of the contract is marked "Exhibit D," and appears at page 26 of the record. It contains, *inter alia*, the following: —

". . . Whereas the party of the second part is desirous that its citizens should have the *best possible protection against fire*.

"NOW, KNOW ALL MEN BY THESE PRESENTS, That said Water Company, the party of the first part, agrees with said city, the party of the second part, as follows, namely:

"*First*. That it will furnish said city water as hereinafter provided, *unless sooner terminated by the purchase of its property by said party of the second part in accordance with Section 11 of Chapter 235 of the Acts of 1880*.

"*Second*. That it will lay and maintain a system of pipes in said Newburyport, substantially in accordance with the plan marked 'A, 1880,' deposited in the City Hall in said Newburyport; that the source of supply and size and quality of the pipes to be used shall be approved by the board of water commissioners of said city as provided in said act; that it will furnish and set one hundred and twenty-five double-nozzle fire hydrants at points indicated on said plan, and at any time or times, on request of the city council of Newburyport, will furnish and set additional hydrants at points indicated by said party of the second part, at the expense of said party of the first part, provided that the whole number of hydrants shall not

exceed one hundred and fifty; that it will at all times maintain a *head of water* NOT LESS than one hundred and twenty-five feet above tide water, and will *furnish* and maintain *a* FULL *supply of water for fire purposes during the existence of this contract.*

"And in consideration of the above, the party of the second part agrees to pay therefor to the party of the first part the sum of six thousand dollars *in each and every year during the existence of this contract*, payable in half-yearly payments in January and July. And it is agreed that said term of twenty years shall begin at such time as said company shall have so far completed its works as to be able to comply with the terms of this contract and shall notify said city that it is ready to furnish said water, and that said date shall not be later than the first day of January, A.D. 1882." (R. 26, 27.)

Other averments in the bill relating to said contract appear in the record. (Bill, pars. 4, 5, and 6, R. 2, 3.)

The Preliminary Questions.

First.

THAT THE TESTIMONY OF THE COMMISSIONERS SET FORTH IN THE NEW STIPULATION IS COMPETENT.

Deferring, for the present, consideration of whether or not such testimony, if admissible, was admissible *at that stage of the case*, we submit that the competency of such evidence is clearly established by the case of —

Bridge v. *Gray*, 14 Pick. 55.

The question in that case was whether or not the evidence of a foreman of a jury was admissible in another trial to show that a certain claim had not been consid-

ered by the jury in their verdict and was not included therein.

See headnote; also opinion of Chief Justice SHAW, 14 Pick. at pages 59, 60.

We submit that obviously the province of a commissioner is, on the side of fact, the same as the province of the jury; the province of the *chairman* of commissioners being, on the side of fact, substantially that of *foreman* of the jury. The stipulation says, "The commissioners . . . if called as witnesses in this cause would testify, without contradiction," etc. The above statement of course includes the testimony of the *chairman* of the commissioners, and is, in effect, the same as the testimony of the foreman of a jury.

The record in the present case prior to the new stipulation showed that the commissioners valued "3. *The personal property.*" (R. 10.) At one of the hearings defendant argued that, as the contract was clearly personal property, it was presumably included in said valuation by the commissioners.

As the word "property" is "*nomen generalissimum*" (2 Gray, 35), we cannot meet that presumption unless we are permitted to show that the commissioners did *not* value the contract, and that therefore the term "personal property" in the above statement of valuation did not include the contract.

We submit that the situation is precisely similar to the situation in *Bridge* v. *Gray*, *ubi supra*, where there was a general account which, so far as its terms appear, *might* have embraced the claim which the foreman of the jury and others were permitted to show it did *not* actually embrace.

Wherefore we respectfully submit that it is established under *Bridge* v. *Gray* that the offered testimony of the commissioners is *competent* and admissible.

That conclusion is strengthened by the case of —

Eastman v. *Cooper*, 15 Pick. 276, —

which was tried upon the general issue before SHAW, C. J., ibid. p. 280. In that case the evidence offered was the report of Chief Justice PARKER; and we submit the inference to be deduced from that case is that, where a case is being tried without a jury, the evidence of the officer or officers composing the tribunal is competent and admissible to show that what might, by the terms of the decision, have been included in the judgment was *not* actually included therein.

The same principle is sustained in —

Webster v. *Lee*, 5 Mass. p. *334. (Cited by SHAW, C.J., in *Bridge* v. *Gray*, 14 Pick. at page 60.)

The following is from the headnote: —

"Where parties have submitted all demands to *referees* by a rule entered into before a justice of the peace, and the referees have made their report on all the demands submitted to the Court of Common Pleas, who have rendered judgment thereon, it is still *competent* for one of the parties *to show that a particular demand*, not being in dispute, was *not laid* before the referees, and upon this being proved, an action may be maintained upon such demand."

See the opinion at pages *336, 337.

We submit that *Webster* v. *Lee* is still more closely in point in that the same principles as those which were applied in the case of the foreman of the jury in *Bridge* v. *Gray*, *ubi supra*, and to the memorandum of the chief justice in *Eastman* v. *Cooper*, *ubi supra*, were held to be applicable where the hearing had been conducted by *referees*.

We submit it clearly appears that the evidence offered was offered not in contradiction of the record of the hearing before the commissioners, but simply in explanation of it, and *to rebut the presumption* that the term "personal property" in the commissioners' report included the contract. In short, we submit it is conclusively established by the above authorities that the testimony of the commissioners was and is *competent to show that the contract was not valued in the commissioners' award.*

Second.

THE TESTIMONY OF THE COMMISSIONERS WAS ADMISSIBLE AT THAT STAGE OF THE CASE.

We do not deem it necessary to go over the history of the case for the purpose of showing that the hearing upon which the opinion of August 8, 1900, was rendered was *not a final hearing*. It was specifically limited to hearing a particular constitutional question. (R. 113.)

Moreover, it is important that the court should note that *that precise constitutional question had already been determined by the court in plaintiff's favor* upon the presumption (necessitated by the demurrer upon which the hearing was held) that the alleged compulsion-in-fact existed.

The court had found, in effect, that if the alleged compulsion-in-fact existed, such compulsion-in-fact *constituted also compulsion in law;* that the result of such compulsion was that the sale, though apparently voluntary, was compulsory in law; that such compulsory sale constituted a *taking* by the defendant City; and that, as such taking was without just compensation, it was without due process of law, and was in violation of plaintiff's rights under the Fourteenth Amendment. (See opinion in *Newburyport Water Company* v. *City of Newburyport*, filed February 24, 1898, and reported in 85 Fed. Rep. p. 723. R. 108.)

We respectfully claim and submit that said decision and opinion of February, 1898, constituted not only the law of

this case, but the law of this circuit when we went to the hearing upon the constitutional question, which was decided adversely to plaintiff August 8, 1900.

We ask the court to note especially that, under the decision overruling the demurrer, nothing remained for plaintiff to do but to show the existence of the FACTS alleged in the bill as constituting the compulsion and destroying the voluntary character of the sale.

These alleged facts were established by the stipulation, and were not contradicted. (R. 91, par. 2.)

As the facts constituting what the court had held to be compulsion in law were established in the record without contradiction, we submit that plaintiff was wholly justified in assuming that the prior decision in our favor would be sustained.

Moreover, the defendant, in its petition for rehearing, had claimed as follows: —

> "4. The court assumes in its opinion that the plaintiff's conveyance of its property was involuntary and compulsory, because it is so alleged in the bill. The facts bearing upon this question are fully set out in the bill, and they do not support but are inconsistent with this allegation. The defendant is not concluded by the allegation if the facts set out do not support it or are inconsistent with it. This position is supported by the authorities, many of them binding upon this court, cited on pages 19, 20 and 35 of the defendant's brief, which are not alluded to in the opinion and do not appear to have been considered." (R. 98–99.)

This point was again considered upon briefs of counsel on the petition for rehearing. The opinions of the Circuit Court in both cases show that the matter was presented and determined wholly upon the threat of municipal competition which was set out in the bill. The threat was a matter of record in the statute, and **the only possible fact**

remaining to be proved was that the stockholders were influenced by the threat.

The petition for rehearing was denied. (R. 101.)

[That the final decision of the Circuit Court against us was not caused by any failure to establish by evidence the allegations of the bill is further supported by the fact that the Circuit Court sustained the *demurrer* in the Gloucester case.] (Gl. R. 89.)

We submit, then, that plaintiff was not only justified in assuming at the argument upon the constitutional question that the prior decision in our favor would be sustained, but was also justified in not adding to the length and difficulties of the case by attempting to bring any additional points before the court either for the purpose of influencing its opinion in relation to the alleged violation of the Fourteenth Amendment, or for the purpose of establishing plaintiff's claim that the legislation complained of impaired the obligation of plaintiff's contracts.

In short, we submit that, in principle, plaintiff's position is like the position of the plaintiff in the case of —

Loring v. *Salisbury Mills*, 125 Mass. 138.

That case was an action of *tort* for an illegal issuing of certificates of stock by the defendant corporation.

The full bench of the Massachusetts Supreme Court held that an action of tort could not be maintained, because the plaintiff's title to the stock was an equitable and not a legal title; and ordered "*judgment for the defendant.*"

Ibid. p. 141.

We beg to quote what follows: —

"GRAY, C.J.: The plaintiff was evidently *misled* by the suggestion, in the rescript in *Salisbury Mills* v. *Townsend*, 109 Mass. 115, that his remedy was *at law*. By virtue of the terms of the original indenture,

and of the power of appointment executed in accordance therewith, he has clearly become, *in equity*, the assignee of any rights of action for injuries to the trust property before his appointment. *Justice therefore requires* that he should have the *opportunity* of trying the question whether he can maintain his claim in equity against the defendant.

Amendment allowed."

Ibid. p. 142.

The plaintiff in *Loring* v. *Salisbury Mills* was one of the parties to the action in —

Salisbury Mills v. *Townsend et al.*, 109 Mass. 115.

In reliance upon the decision in 109 Mass. he brought his action in tort.

Note that in that action the full court actually ordered *judgment for the defendant;* yet, because the plaintiff was *misled* by the decision in 109 Mass., the plaintiff was allowed to amend his case from an action at law by filing a bill in equity.

125 Mass. 142.

The suit in equity was thereupon tried, and the plaintiff was finally successful therein.

We respectfully submit that we were misled, by the prior decision in our favor, in thinking that this court would not overrule its decision in our favor upon defendant's demurrer. We submit that, even if the court had sent down a decree in defendant's favor dismissing the bill, yet, to paraphrase the opinion of GRAY, C.J., above quoted, — 125 Mass. p. 142, — *justice would require* that plaintiff should have the opportunity of trying the question whether it can maintain its claim against the defendant *in any other way consistent with its present bill.*

In the present case, however, we submit that the Circuit Court did not have to go so far as did the Massachusetts court. There had been no appeal; there had not even been a final hearing; there had been only a special hearing upon a single question; and, in view of the difficulties and importance of the case, we submit that, even had we not been misled by the previous decision, justice and equity required that we should have a full opportunity to present any additional aspects of the case other than the one determined against us August 8, 1900. (R. 113.)

Moreover, we respectfully claim, as matter of right, that we should have been permitted, and should be permitted, under all the circumstances, to make a full presentation of our claim relating to the obligation of contracts, and that the evidence offered in said stipulation is necessary to sustain such claim.

Third.

THE EVIDENCE OFFERED BY PLAINTIFF UNDER THE NEW STIPULATION IS MATERIAL.

The evidence was offered to show that the Water Company's contract with the City for water for fire purposes was not included in the valuation made by the commissioners, and therefore is not to be paid for under the act of 1894.

Any legal contract, exclusive or non-exclusive, is within the protection of the constitutional provision prohibiting the impairment of the obligation of contracts; but every contract may nevertheless be constitutionally destroyed by the state, provided there be just compensation for such property like any other property taken. *The provision for payment turns the whole transaction from an impairment of the obligation of the contract into a full recognition of that obligation by providing just compensation therefor.*

See *Long Island Water Supply Co.* v. *Brooklyn*, 166 U.S. 685, at pages 689–693, and numerous cases there cited.

It is clear, therefore, that just compensation for the contract would save the defendant in this case and the state from any possible charge of impairment of the obligation of the contract, just as compensation for the contract enabled the city of Brooklyn to preserve itself from liability in the above Long Island Water Company case. For it is to be noted that in that case "the commissioners valued first the tangible property at $370,000, and the franchises, contracts, and all other rights and property, *including this particular contract* [that is, the contract for hydrant rentals] at $200,000."

166 U.S. at page 691.

Wherefore we claim and submit that evidence that the contract was not included in the commissioners' valuation was and is MATERIAL.

Plaintiff's reply to certain cases cited by defendant to the Circuit Court against the admissibility of said testimony.

Defendant's said cases were all Massachusetts citations except two, one of which is a United States Circuit Court case, 28 Fed. Rep. 403, and the other a decision of the House of Lords, L.R. 5 H.L. 418.

These cases may be most conveniently met and explained by presenting at the outset the following extract from the opinion in —

Evans v. *Clapp*, 123 Mass. 165, —

in which case three of the defendant's cases are cited.

These three cases are —

Ward v. *Gould*, 5 Pick. 291, cited 123 Mass. at page 170;

Withington v. *Warren*, 10 Met. 431, cited 123 Mass. at page 170; and —

Buccleugh v. *Metropolitan Board of Works*, L.R. 5 H.L. 418, 451, 462, cited 123 Mass. at page 170.

We submit the following from the opinion in —

Evans v. *Clapp*, 123 Mass., at pages 169, 170:

"It often becomes necessary, in determining *what questions are concluded by the award*, or whether the award is in itself binding upon the parties, to show by parol evidence what took place before the referee, what was in controversy before him, and *what matters entered into his decision*. *The referee is a competent witness himself to establish these facts*. *Martin* v. *Thornton*, 4 Esp. 180. *Strong* v. *Strong*, 9 Cush. 560, 576, and cases cited. *Blakely* v. *Graham*, 111 Mass. 8. *Scott* v. *Perley*, 98 Mass. 511. *Wood* v. *Willis*, 110 Mass. 454. *In Re Dare Valley Railway*, L.R. 6 Eq. 429, 435. But parol evidence is *not* admissible to *vary* or *control* a written award, and there are numerous decisions showing in what cases such evidence is incompetent, and in which a referee is precluded from testifying. *Wiswall* v. *Hall*, Quincy, 27. *Withington* v. *Warren*, 10 Met. 431, 433. *Clark* v. *Burt*, 4 Cush. 396, 399. *Leavitt* v. *Comer*, 5 Cush. 129. *Ward* v. *Gould*, 5 Pick. 291. See 2 Greenl. Ev. § 78."

At page 173: "We therefore decide that the award was competent, and that *it was also competent to show* that the question whether the firm or the company owned the rubber goods was in *controversy* before the referee, and that he *decided* that a *certain number of them* belonged to the firm."

The defendant's latest Massachusetts citation is —

Packard v. *Reynolds*, 100 Mass. 153.

The decision which we cite and quote above is a still later Massachusetts case, 123 Mass., and, if in conflict with the other cases, controls them. Under *Evans* v. *Clapp*, above quoted, it is clear plaintiff does not need to attempt to come in under any *exception* to the general rule. In short, as shown in the above quotation, there are *two rules*, and we claim the benefit of the *first*, which is as follows: —

> "It often becomes necessary, *in determining what questions are concluded by the award*, or whether the award is in itself binding upon the parties, to show by parol evidence what took place before the referee, what was in controversy before him, and *what matters entered into his decision. The referee is a competent witness himself to establish these facts.*"
>
> 123 Mass. 169.

The second rule is there stated as follows: —

> "But parol evidence is *not* admissible to *vary* or *control* a written award, and there are numerous decisions showing in what cases such evidence is incompetent, and in which a referee is precluded from testifying."
>
> 123 Mass. 169, 170.

We do not seek to "vary or control" the written award. The award was a definite sum of money, $275,000 and interest. (R. 11.)

Examining now defendant's citations *seriatim*, we show, —

1. *Legg* v. *Legg*, 8 Mass. 99:

We submit this case is too remote. It is a question of parol evidence respecting the grounds of the judgment of

the court in awarding alimony. The entire opinion is less than four lines, and no citation is given.

2. *Ward* v. *Gould*, 5 Pick. 291:

Opinion is *per curiam*, only six lines. No authorities are stated. This case is cited in —

Evans v. *Clapp*, 123 Mass. at page 170, in the following connection: —

At page 169: "The referee is a competent witness himself to establish *these facts*. *Martin* v. *Thornton*, 4 Esp. 180. *Strong* v. *Strong*, 9 Cush. 560, 576, and cases cited. *Blakely* v. *Graham*, 111 Mass. 8. *Scott* v. *Perley*, 98 Mass. 511. *Wood* v. *Willis*, 110 Mass. 454. *In re Dare Valley Railway*, L.R. 6 Eq. *170 429, 435. But parol evidence *is not admissible to *vary* or *control* a written award, and there are numerous decisions showing in what cases such evidence is incompetent, and in which a referee is precluded from testifying. *Wiswall* v. *Hall*, Quincy, 27. *Withington* v. *Warren*, 10 Met. 431, 433. *Clark* v. *Burt*, 4 Cush. 396, 399. *Leavitt* v. *Comer*, 5 Cush. 129. *Ward* v. *Gould*, 5 Pick. 291. See 2 Greenl. Ev. § 78."

3. *Gay* v. *Welles*, 7 Pick. 217:

This was a jury case where the evidence offered was "inconsistent with the record," and its exclusion was approved by the full court because the evidence offered "*contradicts the record*" (p. 219).

Note that even in the above case the court pointed out an additional remedy.

This case seems never to have been cited by the court.

4. *Withington* v. *Warren*, 10 Met. 434:

This was a case where the parol evidence was offered to *contradict* the award. As shown above, it is one of the

cases cited in *Evans* v. *Clapp*, 123 Mass. at page 170, to show that a referee's testimony is not admissible to carry or control a written award. But it leaves untouched the earlier rule stated at 123 Mass. 169, and under which we claim that we have a right to use such evidence to show what matters entered into the referee's decision, or, as part of the same rule, what matter was excluded from the referee's decision.

5. *Chappell* v. *Hunt*, 8 Gray, 427:

This is a case of a levy of execution and the identity of land; and we submit that upon inspection it has nothing to do with the present case.

6. *Sparhawk* v. *Twitchell*, 1 Allen, 450:

In that case it was sought to *impeach* a final decree of a court of equity and to control it "by statements contained in the master's report." (Ibid. p. 451.) The master's report had been merely "received in evidence" in the course of the original hearing, and presumably other evidence was also given. The court held that the decree could not be impeached by the master's report. We submit that that case is too remote to be an authority one way or the other upon the present case, and that it leaves the present case to be decided upon the authorities which are directly applicable.

7. *Monk* v. *Beal*, 2 Allen, 585:

The opinion shows that the testimony of an auditor was offered to *impeach* his report.

As we do not seek to impeach the award in the present case we submit that *Monk* v. *Beal* is not authority against us.

8. *Packard* v. *Reynolds*, 100 Mass. 153:

This is the latest and last Massachusetts case cited by the defendant against us.

It is another case of an attempt to *contradict* an auditor's report by the testimony of the auditor.

The entire opinion upon this part of the case is as follows: —

> "The report having been read in evidence, the defendant had no right to call the auditor to *contradict* it. *Monk* v. *Beal*, 2 Allen, 585." (100 Mass. 155.)

9. *Alexander* v. *McNear*, 28 Fed. Rep. 403:

The headnote is as follows: —

> "1. *Arbitration — Enforcing Awards — Degree of Certainty Required — Judgment.*
>
> "Judgment cannot be rendered on an award which does not fix with certainty the amount to be paid, or give precise *data* from which the amount can be ascertained.
>
> "2. *Same — Arbitrators — Uncertainty in Award — Evidence.*
>
> "Arbitrators cannot be called upon for the purpose of explaining anything *vague* and *uncertain* in their award."

We submit that the inapplicability of that case to the present is obvious. The award in the Alexander case was uncertain and vague, and the court therefore refused to confirm it.

In the present case the award is clear and specific, being for $275,000 and interest. (R. 13.)

The Alexander case is therefore not an authority against our contention that we have a right to show by the testimony of the commissioners that they did not include the value of the contract in their clear and specific award of $275,000 and interest.

The last case cited by defendant is —

10. *Buccleugh* v. *Metropolitan Board of Works*, L.R. 5 H.L. 418, 457, 462:

The case itself is long and complicated, and contains numerous opinions, a quotation from one of which appears in the opinion in *Evans* v. *Clapp*, 123 Mass. at pages 170, 171.

We submit that a careful examination of the Buccleugh case, and of its use by the Massachusetts Supreme Court in 123 Mass., at page 170, will show that it is authority *for* the plaintiff's contention instead of against it.

Other cases cited in and citing the above cases:

Ziegler v. *Ziegler*, 2 S. & R. 286, cited 123 Mass. at page 171:

From headnote: "Where an award of arbitrators is in issue, the arbitrators may be examined to prove *what* they decided upon."

Ziegler v. *Ziegler* is confirmed in —

Coleman's Appeal, 62 Pa. St. at page 273, —

from which we quote as follows: —

"It is established by a number of cases in this court that parol evidence may be given to *explain* and *limit* the effect of a judgment *wherever it is not inconsistent with the record.*"

The court here cites the Ziegler case and other cases. The Ziegler case is also cited with approval in —

Follansbee v. *Walker*, 74 Pa. St. at page 310.
In re Dare Valley Railway Co., L.R. 6 Eq. 429, 435.

That case is cited (as we claim, in our favor) in 123 Mass., at page 171; also in the Buccleugh case, L.R. 5 H.L. at page 428.

The headnote is as follows: —

"The court will admit evidence of an arbitrator in explanation of his award; and when it appears from

such evidence that there has been a mistake on his part, either as to the subject-matter referred to him, or in point of legal principle affecting the basis on which the award is made, the award will be set aside or referred back again to the arbitrator."

Wherefore we submit that where the award itself is definite and is not in question, and it is not sought to impeach or control it, the testimony of the referees or commissioners is admissible to "explain it," or to show that it did not include the contract.

We are not here seeking to vary, control, impeach, or contradict the commissioners' finding that the contract was not valued, or their ruling that "the same in law could not be valued." On the contrary, we submit that as the whole award was approved by the Supreme Court of Massachusetts, *that ruling stands as showing how the statute of 1894 was construed and applied.*

Our grievance is against the state of Massachusetts for having passed a law which, as construed and applied, impaired the obligation of this contract. *If we were compensated for the contract, then, under the decisions cited in our brief, our grievance as to the contract would disappear.*

Defendant's counsel, having succeeded in getting a construction of the statute which excluded the contract from valuation, and having succeeded in causing the value of the contract to be excluded from the award, now comes forward with the inequitable claim that we shall not be permitted to show that the contract was not valued, but that the present court of equity is bound to treat the case as if the contract had been valued, although through defendant's action the same was excluded from valuation! We submit it needs no argument to show that such inequitable claim should not be allowed. Moreover, we submit that the case is clearly within the opinion in *Dare Valley*

Railway Co., L.R. 6 Eq. 429, 435, above cited and quoted (*ante*, p. 164).

Note, *ubi supra*, that the Dare Valley case was relied upon both by the Massachusetts Supreme Court and also by the House of Lords, and that in it the court admitted evidence of the arbitrator to explain the award, and thus permitted it to be shown *what was the legal basis of the award*.

As sustaining our present contention, see also —

Strong v. *Strong*, 9 Cush. 569.

This is one of the cases citing —

Withington v. *Warren*, 10 Met. 434, —

cited in defendant's brief, at page 2.

In *Strong* v. *Strong* there was another attempt to *impeach* an award. That case shows that under certain circumstances an arbitrator may even testify to facts which would show the award to be void for illegal cause.

In short, we submit the authorities are clear that, as the tribunal found *as matter of law*, that the contract was not to be valued, and therefore did not value it, we are entitled to show by the commissioners that the contract was *not* included in the valuation stated in the award.

We submit that this position is confirmed by the cases cited above by plaintiff, and also by the opinion in —

Hale v. *Huse*, 10 Gray, 102.

In that case the objections to the testimony were largely the same as the objections here. They are stated as follows: —

> "The defendant objected 'that the action could not be maintained on the ground that this was an attempt to *impeach* collaterally the award of the referees;

that no action lies to recover money paid on a judgment of court still unreversed; that the judgment upon Brown's petition could not affect this defendant, being *res inter alias;* that as Hale paid the money on Brown's decree of sale before he satisfied the defendant's execution, he did not pay it to the defendant's use; that the plaintiff's proper remedy, if he has any, *was to review or reverse the judgment upon the award;* and that he had not called all the referees, but had undertaken to show the judgment of all by the testimony of but two.' But the court refused so to rule." (10 Gray, 101.)

While there were other points in the case, the matter of the evidence of the arbitrators was treated independently by the court and disposed of summarily as follows: —

"THE EVIDENCE OF THE ARBITRATORS WAS NOT OFFERED TO IMPEACH THEIR AWARD, BUT TO SHOW THAT THIS CLAIM WAS NOT INCLUDED IN IT; AND FOR THIS PURPOSE WAS CLEARLY ADMISSIBLE." (10 Gray, 102.)

Similarly, we ask the court here to find that, notwithstanding any claim or suggestion that the evidence which we offer is offered to impeach the award, such evidence is "*not* offered to impeach their award," but to show that the contract was "*not included in it.*" (Ibid. page 102.) And finally we ask the court to hold, as above ruled, that the evidence offered "for this purpose was clearly admissible." (Ibid. page 102.)

Wherefore we claim and submit that the error specified in the eighth assignment of error (concerning the exclusion of testimony) has been established. (See assignment of error VIII., R. 133; also *ante*, p. 18.)

Argument upon the Merits.

I.

PLAINTIFF AND DEFENDANT MADE, UNDER THE AUTHORITY OF THE STATE, AN EXCLUSIVE CONTRACT FOR THE CITY'S WATER SUPPLY FOR FIRE PURPOSES DURING THE CONTINUANCE OF THE CONTRACT, AND NOT EXCEEDING TWENTY YEARS. AND WHEN THE STATUTES OF 1893 AND 1894 WERE ENACTED, THE CONTRACT HAD SEVERAL YEARS YET TO RUN.

The act of 1880, incorporating the plaintiff Company authorized the City of Newburyport to contract with the Newburyport Water Company for a supply of water for fire purposes for a term of years. (Acts of 1880, c. 235, section 8. R. 20. See Appendix, *post.*)

In accordance with these provisions a contract between the plaintiff and defendant was duly made, and was to run for twenty years from October 1, 1881, unless the City should purchase the property in accordance with section 11 of the act of 1880. (See allegations in paragraph 4 of Bill, R. 2, 3.)

As the answer admits the making of the contract, and the establishment of the system under it, it is not necessary to show that all the preliminary steps were taken which were necessary to make the contract binding. (Answer, par. 4, R. 60.)

> *Knox County* v. *Ninth Nat. Bank*, 147 U.S. at page 98:
>
> "But further, the validity of the bonds *is admitted by the answer, and, therefore, it is unnecessary to prove every separate step which otherwise might be required in order to show the legality of this issue.*"

Under this contract the Water Company agrees, *inter alia*, —

"that it will furnish said city water as hereinafter provided, *unless sooner terminated by the purchase of its property by said party of the second part in accordance with Section 11 of Chapter 235 of the Acts of 1880*," and "that it will at all times maintain a *head of water* NOT LESS than one hundred and twenty-five feet above tide water, and will *furnish* and maintain a FULL *supply of water for fire purposes during the existence of this contract*."

And in consideration of the above the City agrees to pay therefor $6000 "in cash and every year during the existence of this contract." (R. 27.)

A. *This contract for a full supply of water for fire purposes was expressly exclusive; because it provided that the Company should at all times during the term of the contract furnish "a* FULL *supply of water for fire purposes."*

1. It is true that the word "exclusive" is not used, but we submit that that word is not the only term by which the exclusiveness of a contract can be expressed; and that if the right in question under the contract is *clearly made known* or *distinctly indicated* by written words therein, the contract or agreement is *express* with reference to such right.

The verb "express" is defined in the Century Dictionary as follows: —

> . . . "3. To manifest or exhibit by speech, appearance or action; *make known* in any way, but especially by *spoken or written words*."

While the adjective is defined thus:

> "I. *a. 1. Clearly made known; distinctly* expressed or *indicated; unambiguous;* explicit; direct; plain."

2. Under the above definitions *it is clearly made known and distinctly indicated* by written words in the contract that it is intended *that plaintiff alone should furnish water for fire purposes* to defendant during the continuance of the contract.

Note that the language is "full supply of water for fire purposes."

We submit that these words mean *just what they say;* that they are plain, and need no interpretation.

Ruggles v. *Illinois*, 108 U.S. 526, at page 534.

We submit that "full supply" is the equivalent of *entire* supply, — *complete* supply, — *all* the supply *which the City needs and is to use*, — all of course for the limited purpose, to wit, for *fire purposes*.

That this language is exclusive, and obliges the City to procure all its water for fire purposes from the defendant Company, see —

Smith v. *Morse*, 20 La. Ann. 220.
National Furnace Co. v. *Keystone Mfg. Co.*, 110 Ill. 427.

It may be claimed by the defendant that, as the number of hydrants was limited in the contract, this limitation controlled the term "a full supply of water for fire purposes," and prevents the construction that the contract was for the City's entire supply of water for fire purposes during the existence of the contract.

If this claim be made, we answer as follows: —

First. The presumption is that the words "*full* supply" mean just what they say.

Ruggles v. *Illinois*, 108 U.S. p. 534, cited above.

And if defendant claims that a full supply cannot be furnished by and through the number of hydrants provided in the contract, it is for defendant to establish that fact.

Second. It is not shown, nor is it even claimed, that the plaintiff Company ever failed to furnish the full, the entire, supply of water for fire purposes.

Third. The stipulation filed June 10, 1899, provided, *inter alia*, as follows: —

> "This stipulation . . . is not intended to exclude any matters of which the Court may take *judicial notice*." (R. 91.)

Judicial notice extends to matters of science involved in the case, and if the judge's memory is at fault he may refresh it by resorting to any means for that purpose which he may deem safe and proper.

And where the court may take judicial notice, no pleadings or proofs of the matter which is subject to judicial notice need be made or offered.

> *Brown* v. *Piper*, 91 U.S. at pages 42, 43.
> *Specialty Mfg. Co.* v. *Fenton Mfg. Co.*, 174 U.S. at page 497.
> *Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. 1, at page 11.

Fourth. By the application, under the law of judicial notice, of well-known hydraulic or hydrodynamic principles to the terms of the contract, it will be seen that the supply of water is not limited by the limitation as to the number of hydrants, but that the Water Company is bound, under the contract, to furnish to the City a full, unlimited supply of water for fire purposes. It is to be noted that the contract, after providing for the number of hydrants, continues: "That it [the Water Company] will at all times maintain a *head of water* NOT LESS than 125 feet above *tide water*, and will furnish and maintain a full supply of water

for fire purposes during the existence of this contract." (R. 27.)

The meaning of the term "head of water" is thus explained in Webster's Dictionary under "Head":

> "*Head* . . . 8. The source, fountain, spring, or beginning, as of a stream or river; as, the *head* of the Nile; hence, the *altitude of the source*, or *the height of the surface, as of water, above a given place*, as above an orifice at which *it issues*, and *the pressure resulting from the height or from motion*."

Under the above definition it appears that the Company agreed to maintain in its reservoir or standpipe a column of water, the height of which should be *not less* than 125 feet above tide water.

The above definition also states the well-known and obvious fact that the pressure of the column of water depends upon its height; and we have no doubt that the court knows, and will take judicial notice of the fact, that the amount of water furnishable through the hydrant is governed and limited only by the pressure with which the water is forced through the hydrant.

When, therefore, the parties provided in the contract for a *full supply of* water for fire purposes, and in connection with that provided that the "head of water" should be maintained at *not less* than 125 feet above tide water, and *there was no limitation as to how much higher the head of water should be*, we submit that the obvious and necessary construction of the contract is that a full supply of water must be furnished from the hydrants; and if a head of water 125 feet was not sufficiently high, the Company must make the standpipe enough higher to furnish a "FULL *supply* of water for fire purposes."

Wherefore we submit it remains that it is established that the contract for a FULL *supply of water for fire purposes was expressly exclusive.*

B. *The exclusiveness of the contract, during its limited term, was an incident of the statutory power to make the contract; because —*

1. *The exclusiveness would not lead to a monopoly as against the City; because —*

(*a*) *The term of the contract was limited.*

The Company's right and duty to furnish this full supply of water for fire purposes was to continue for twenty years "unless sooner terminated by the purchase of its [the Company's] property by said party of the second part in accordance with section 11 of chapter 235 of the acts of 1880." (R. 26, 27.)

(*b*) The City had "the right at any time after ten years from the date of the completion of said works to purchase the corporate property and all the rights and privileges of said company." (Acts of 1880, c. 235, sec. 11. R. 21. Appendix, *post*.)

In —

Walla Walla City v. *Walla Walla Water Co.*, 172 U.S. 1, at pages 17, 18, —

the court said, —

> (From Opinion:) "6. Nor do we think the contract objectionable in its stipulation that *the city would not erect water works of its own during the life of the contract*. There was no attempt made to create a monopoly by granting an exclusive right to this company, and the agreement that the city would not erect water works of its own was accompanied, in section 8 of the contract, with a reservation of a right to take, condemn and pay for the water works of the company at any time during the existence of the contract. *Taking sections 7 and 8 together, they amount simply to this:* That if the city should desire to establish water works of its own it would do so by condemning the

property of the company and making such changes in its plant or such additions thereto as it might deem desirable for the better supply of its inhabitants; but that it would not enter into a direct competition with the company *during the life of the contract. As such competition would be almost necessarily ruinous to the company, it was little more than an agreement that the city would carry out the contract in good faith.*

"*An agreement of this kind was a natural incident to the main purpose of the contract, to the power given to the city by its charter to provide a sufficient supply of water, and to grant the right to use the streets of the city for the purpose of laying water pipes to any persons or association of persons for a term not exceeding twenty-five years.* In establishing a system of water works *the company would necessarily incur a large expense* in the construction of the power house and the laying of its pipes through the streets, and, *as the life of the contract was limited to twenty-five years, it would naturally desire to protect itself from competition as far as possible, and would have a right to expect that at least the city would not itself enter into such competition.* It is not to be supposed that the company would have entered upon this large undertaking in view of the possibility that, in one of the sudden changes of public opinion to which all municipalities are more or less subject, the city might resolve to enter the field itself — *a field in which it undoubtedly would have become the master* — and *practically extinguish the rights it had already granted to the company.* We think a disclaimer of this kind was within the FAIR INTENDMENT of the contract, and that *a stipulation to that effect was such a one as the city might lawfully make as an incident of the principal undertaking.*

"Cases are not infrequent where under a general power to cause the streets of a city to be lighted, or to

furnish its inhabitants with a supply of water, *without limitation as to time*, it has been held that the city has no right to grant an exclusive franchise for a period of years; but these cases do not touch upon the question how far *the city, in the exercise of an undoubted power to make a particular contract, can hedge it about with limitations designed to do little more than bind the city to carry out the contract in good faith, and with decent regard for the rights of the other party.*"

That is, the limited exclusiveness was upheld because the state's right to buy prevented the monopoly as against the City, which is the ground upon which the alleged exclusiveness of municipal contracts is forbidden, where it would be upheld in contracts between private persons or private corporations.

And this rule is upheld in —

Citizens St. Ry. Co. v. *Detroit Ry.*, 171 U.S. at page 54, citing —
Grand Rapid &c. Power Co. v. *Grand Rapid &c. Co.*, 33 Fed. Rep. 659.

It may be claimed by the defendant that, as the City of Newburyport did not have the right to purchase the Company's property during the first ten years of the contract, the contract as to exclusiveness was void. It is to be observed, however, that the legislation complained of, and the acts of the parties complained of, did not occur within such first ten years, and that, at the times of all the transactions complained of, the City had the full right to purchase all the Company's property (just as in the Walla Walla case) merely upon paying just compensation therefor.

Wherefore we submit it remains that the case here presented falls wholly within the principles of law established in the Walla Walla case, *ubi supra*.

2. *The power to make such exclusive contract was given to the parties by the act of 1880.*

If it be contended that the City had no power to make such an exclusive contract, the answer is clearly and decisively furnished by the terms of the act of incorporation, and by the Walla Walla case, *ubi supra*.

The act of incorporation, as already shown, expressly provided as follows: —

> "The city of Newburyport is hereby authorized to contract for a *supply of water for fire purposes for a term of years with said Newburyport Water Company; provided*, the same is assented to by said city by a majority vote of the voters present and voting thereon at a legal meeting called for that purpose."
>
> Section 8 of chapter 235, acts of 1880. (R. 20, 21. Appendix, *post*.)

It is true that that act does not define the term of years, and that it only says "a supply of water for fire purposes," while the contract adds the word "*full*," — a "*full* supply of water for fire purposes." (R. 27.)

Under the decision in the Walla Walla case we submit that both the terms of the contract, to wit, (1) its duration for twenty years, and (2) that the supply shall be a full supply of water for fire purposes, are upheld as an "*incident of the contract*" authorized by the statute.

172 U.S. at pages 17, 18, *ubi supra*.
See also *Los Angeles* v. *Los Angeles City Water Co.*, 177 U.S. 558, at pages 570, 571.

Wherefore we submit it is established that the contract for a full supply of water for fire purposes was expressly exclusive, and that such exclusive contract was authorized by the act of 1880, incorporating the plaintiff Company.

Among the many cases which we have examined holding that municipal contracts cannot be held to be valid, exclusive contracts, we have not found one which in fact and in principle contradicts our claim. In many of the cases the courts have refused to uphold the contract, not because it was not expressly exclusive, but *because the City was utterly without power to make any such contract.* Some of these decisions are cited by the court in the Walla Walla case next following the quotation therefrom given above (*ante*, p. 173).

Such decisions did not, however, prevent the Supreme Court from upholding the exclusiveness of the contract in the Walla Walla case; and we submit that they should not prevent this court from upholding the exclusiveness of the contract in the present case, — an exclusiveness authorized and upheld as a mere "*incident*" to the contract authorized by the statute, and constituting only a limitation "designed to do little more than *bind the City to carry out the contract in good faith, and with decent regard for the rights of the other party.*"

172 U.S. at page 18.

Examination of United States Supreme Court cases cited for defendant (in an earlier brief) upon the question of the exclusiveness of the contract for water for fire purposes.

If, however, the defendant should seek, notwithstanding the unambiguous terms of the contract, to claim that it was not exclusive, we beg the court to examine carefully and critically the terms of each and every contract in every case, if any, which may be cited by the defendant [or by the court] to show that our contract is not in terms exclusive.

Among the many superficially similar cases which we have examined, we have not found one case where the contract was held not to be exclusive, and where the terms

were like the terms upon which we claim our contract to be exclusive to the extent of furnishing water for fire purposes. In fact, in many of the cases the ground of the decision cited against us as showing the contract to be non-exclusive is seen, when examined closely, to be something clearly distinguishable from the present case.

We have examined the United States Supreme Court cases cited in respondent's brief in the Circuit Court, upon the constitutional question under his heading and claim that "The Plaintiff had No Exclusive Rights Under Any Implied or Resulting Contract With The City."

The first is —

> *Spring Valley Water Works* v. *Schottler*, 110 U.S. 547 (should be 347).

The remoteness of that case from the point to which respondent's counsel cited it, is best shown by the following extract from the opinion: —

> (At page 351:) "The general question involved in this case is whether water companies in California, formed under the act of 1858 before the adoption of the Constitution of 1879, have a right, which the State is prohibited by the Constitution of the United States from impairing or taking away, to charge their customers such prices for water as may from time to time be fixed by a commission made up of two persons selected by the company, two by the public authorities of the locality, and, if need be, a fifth selected by the other four, or by the sheriff of the county. The Spring Valley Company claims no rights of this character that may not also be claimed by every other company formed under the same act."

The next case cited by respondent is —

> *Lehigh Water Co.* v. *Easton*, 121 U.S. 388.

As that case was also cited by the court against us (R. 118), it deserves careful consideration.

The ground of the decision in the Lehigh case was *not* that the contract was not in terms exclusive, but the fact that the law, which was alleged as impairing the obligation of the Lehigh Water Company's contract, was a law which existed *before* the enactment of the law under which exclusive rights were claimed: to wit, the alleged impairment was under the act of 1867, while the rights involved were conferred by the act of 1874, and the court said, —

> "Had the borough of Easton been authorized by a statute enacted *after** the Lehigh Water Company had acquired the exclusive privilege given by the act of 1874, then this court would have been compelled to decide, upon its independent judgment, whether the latter applied only to private corporations."
>
> Ibid. at pages 391, 392.

Respondent's next case is —

> *Sioux City St. Ry. Co.* v. *Sioux City*, 138 U. S. 98, 107.

Turning to page 107, as indicated in respondent's brief, we find there that the question involved was not whether, as a matter of construction, the contract was exclusive, but whether the City had *power* to make the contract. The language of the court there is as follows: —

> "*It was not in the power* of the city, by any contract with the company, to deprive the legislature of the power of taxing the company."
>
> Ibid. p. 107.

We have shown, *per contra*, that under St. 1880, and the decision in the Walla Walla case, the City of New-

* The italics are by the court.

buryport had the power to make the contract exclusive for the term of twenty years.

Respondent's next case is —

> *Long Island Water Co.* v. *Brooklyn*, 166 U.S. 685, 696.

We presume that the citation of page 696 refers to the brief sentence "the contract in terms contains no words of exclusion."

The contract itself is not set out. There is nothing on page 696 to show what its terms were, and we have been unable to find that the contract is copied or quoted from anywhere in the United States report. On page 686 we find the following in the headnote: —

> "An existing system of water supply in a municipality which is the property of private individuals and is operated under a contract with the municipal corporation for furnishing it with a *portion of its needed supply of water under rates fixed by the* contract, is private property which may be acquired by the public, in the exercise of the power of eminent domain, *on the payment of a just compensation*, including compensation for *the termination of the contract*."
>
> Ibid. p. 686.

We submit that there is nothing in said case tending to show that the Newburyport Water Company's contract with the City was not exclusive to the extent hereinbefore claimed and shown.

On the other hand, as we show later, the case is authority for our contention that the state cannot constitutionally deprive plaintiff even of its property without providing just compensation not only for the tangible property, but also for said contract; and this whether the contract be exclusive or not.

The last United States Supreme Court case cited by defendant's counsel in the Circuit Court under the heading "The plaintiff had no exclusive rights under any implied or resulting contract with the City" is —

Citizens St. Ry. v. *Detroit Ry.*, 171 U.S. 48, 53.

There the question is not at all one of construction of the contract; but, like all other cases already alluded to, was a question of *power*.

> "At the time when the plaintiff in error received from the city of Detroit exclusive authority to construct and operate its railways in that city, the common council of Detroit *had no power* either inherent or derived from the legislature, to confer an exclusive privilege thereto."
>
> Headnote, 171 U.S. 48.

The opinion shows it was *not the contract* (which was in the form of an ordinance), *but the statute behind the contract*, which was the subject of construction, and the court said, at the page cited by respondent's counsel, —

> "It is clear that the *statute* did not explicitly and directly confer the *power* on the municipality to *grant* an exclusive privilege to occupy its streets for railway purposes. It is urged, however, that such power is to be *inferred* from the provision which requires the consent of the municipal authorities to the construction of a railway under such terms as they may prescribe, combined with the provisions of the constitution." . . . (Ibid. p. 53.)

We do not seek to deny or evade the force of that decision. We beg to point out, however, that it is reported one volume earlier than the Walla Walla case, 172 U.S. 1,

and was undoubtedly familiar to the court when the Walla Walla decision was rendered.

Except for the fact that our act of incorporation authorized the City of Newburyport to contract with the Water Company for a supply of water for a term of years, we probably should not have been able to contend successfully that we had an exclusive contract for a supply of water for fire purposes, but we submit that under the Walla Walla decision, as already shown, our act of incorporation conferred the power to make the contract just as it was made, namely, an exclusive contract for a limited term of years, and containing a provision that the City might buy out the Company; such exclusiveness being, as held in the Walla Walla case, a mere "*incident*" of the authorized contract, and "designed to do little more than bind the city to carry out the contract in good faith, and with decent regard for the rights of the other party."

172 U.S. p. 18.

It may be useful to point out here certain features of these additional United States Supreme Court cases which THE CIRCUIT COURT *relied upon principally in its said opinion of August 8, 1900, upon the question of exclusiveness.*

It should specially be noticed, however, that the court was *not considering the contract*, but was considering the exclusiveness of the Company's general franchises. (R. 116–120.)

The Circuit Court cited (R. 117, 119):

Hamilton Gas Light Co. v. *City of Hamilton*, 37 Fed. Rep. 832; (s.c.) 146 U.S. p. 258.

We submit that that case is clearly distinguished from the present one by the fact that the contracts to furnish the City with gas had *absolutely expired before the passage of*

the ordinance which, it was claimed, impaired the obligation of contract.

See 146 U.S. at pages 261, 262.

In that case the plaintiff Company was given the exclusive right to furnish water from a certain source, but this supply proved inadequate to supply the needs of the people, and the legislature, expressly noting this inadequacy, gave to a new company (defendant) the right to also furnish water.

In view of these facts, the court, while maintaining the exclusiveness of the right in the plaintiff Company to supply water from the particular source, held that the community could be supplied *not by the City, but by another company* FROM ANOTHER SOURCE, — the object being obviously to obtain from all sources that adequate supply which was not furnished by the plaintiff in that case.

In the Walla Walla case insufficiency of the supply was set up in the pleadings, —

172 U.S. at page 18, —

and apparently was fully argued.

Ibid. p. 22.

But the court held that the Company was entitled to its full contract rights, as expressed in the contract itself. At the close of the opinion the court said as follows: —

> "Whether *if a sudden emergency arose*, requiring immediate action on the part of the city to procure a further supply, or to preserve the health of its inhabitants, a preliminary avoidance of the contract would be necessary, is a question not involved in this case, and upon which we express no opinion."

Ibid. p. 23.

Possibly, in case of any such emergency, the court might hold that the police power would give the right to avoid the contract.

Ibid. pp. 15–17.

But in the present case the record contains no suggestion whatever that the Company had not furnished, or could not furnish, a *full* supply of water for *fire purposes*.

Wherefore we submit it remains, as already established, that the Company's contract was exclusive as against the City, at least to the extent of conferring upon the Company the sole right to furnish the City with water for fire purposes during the existence of the contract.

The court next cites again *Hamilton Gas Co.* v. *Hamilton*, which we discussed under its earlier citations (*ante*, p. 182).

Then follows (R. p. 119): —

Pearsall v. *Grand Northern Ry.*, 161 U.S. 646, 664.

The court's quotation contains only a statement of the general principle, and, we submit, is not at all in conflict with the later case and more particular decision in the Walla Walla case upon which we rely. (172 U.S. 1.)

The court's last citation upon the point of exclusiveness is —

Long Island Water Supply Co. v. *Brooklyn*, 166 U.S. 685.

As this was relied upon also by defendant's counsel, we have examined it earlier (see *ante*, p. 180), and have shown that it does not conflict with the decision in the Walla Walla case upon which we rely.

Furthermore, it is to be borne in mind that, as already pointed out, the contract between the City and the Water

Company in the Long Island case *was paid for under the condemnation proceedings: and the court held that such payment, instead of being an impairment of the obligation of contracts, was a recognition of such obligation by paying the value thereof.*

In the present case the stipulation (R. 94) shows that the contract was *not* paid for.

Wherefore we submit it remains that, under the Walla Walla decision, the contract gave to the plaintiff Company the exclusive right to furnish to the defendant City a full supply of water for fire purposes during the life of the contract.

C. Said contract for the full supply of water for fire purposes was also exclusive by NECESSARY IMPLICATION.

If the court should hold that we do not sustain the claim that the contract is *expressly* exclusive, we submit that from the terms of the contract and of the act authorizing it, the contract is exclusive by *necessary implication*, and that what we have offered under point A (*ante*, p. 169) is abundantly sufficient to sustain this claim.

Even the cases cited by the defendant show that such exclusiveness may be created *not only in express terms, but also by necessary implication.*

> *Chicago &c. Railway Co.* v. *Minnesota*, 134 U.S. at page 455.
> *Los Angeles* v. *Los Angeles City Water Co.*, 177 U.S. 558, at pages 570, 571.
> *Atlantic Water Works Co.* v. *Atlantic City*, 39 N.J. Eq. at page 376.

In the latter case there was a separate instrument, which contained the only *express* provision for exclusiveness, but the court disregarded this "covenant" and held that —

> "The franchise granted by the legislature to the Company is, *by necessary implication, exclusive.*"

The same facts on the law side of the case were considered in —

Atlantic City Water Works v. *Atlantic City*, 48 N.J. Law, 378, cited with approval in — *Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. at page 14.

We submit, upon inspection, that all the facts deemed necessary by the court in the Atlantic City case to sustain the claim of necessary implication exist in the present case.

Again we call attention to the *dictum* and reasoning of the court in —

Skaneateles Water Co. v. *Skaneateles*, 184 U.S. 354.

The following is from the opinion: —

At page 364: . . . "*We can appreciate the argument that the village had no right to build and use its own plant during the running of the five years' contract*, but we fail to see the force of the claim that, on account of once making a contract with the plaintiff for five years, the village irrevocably bound itself by an implied contract *never* to build its own plant without taking by condemnation the property of the plaintiff if the parties could not agree on terms of purchase."

At page 363: . . . "Admitting that in every grant there is an implication that the grantor will do nothing to detract from the full and complete operation of the grant itself, we cannot find any implication that, *after the termination of the contract the plaintiff and defendant were empowered to make*, there should be no right in the defendant to build its own system of water works under the statute of 1875, unless it purchased or condemned the property of the plaintiff."

At page 365: "*When the contract for the five years had expired* we look in vain for anything in either of the statutes of 1873 or 1875 upon which to base the implied contract contended for." . . .

Wherefore we submit that the contract for a full supply of water for fire purposes was exclusive during the continuance of the contract.

Even if our claim of exclusiveness is denied by the court, it remains that the contract was in existence, and had some time to run when the acts of 1893 and 1894 were passed, *which acts we shall show* (*post*, 198) *impaired the obligation of said contract.*

It is further proved by the stipulation (R. 94) that the contract was not valued in the award, which was confirmed by the state court.

As the stipulation shows that the commissioners were asked by plaintiff's counsel to value the contract, it results that —

II.

THE ACT OF 1894 AS CONSTRUED AND APPLIED DID NOT PROVIDE COMPENSATION FOR THE CONTRACT.

THE LAW APPLICABLE TO THIS CASE IN RESPECT TO THE IMPAIRMENT OF THE OBLIGATION OF CONTRACTS.

It is worth noting that the very frequency of decisions on the impairment of obligation of contracts makes it difficult to decide new cases differing somewhat in facts from old cases.

Barnitz v. *Beverly*, 163 U.S. 121.

We shall consequently limit our references to the few cases which we deem to be the more directly applicable.

First Proposition of Law.

THE CONSTITUTIONAL PROVISION PROHIBITING THE IMPAIRMENT OF THE OBLIGATION OF CONTRACTS RELATES TO AND PROTECTS ALL CONTRACTS, EXPRESS AND IMPLIED.

See *Long Island Water Supply Co.* v. *Brooklyn*, 166 U.S. at page 690:

"*Every contract is equally within the protecting reach of the prohibitory clause of the Constitution.* The charter of a corporation is a contract, and its obligations cannot be impaired."

2 Story on Constitution (5th ed.) sec. 1377:

"Contracts, too, are express, or implied."

. . . . . .

"*The Constitution makes no distinction between the one class of contracts and the other. It then equally embraces and applies to both.*"

Second Proposition of Law.

ANY CONTRACT TO SUPPLY WATER TO A CITY "IS A CONTRACT PROTECTED BY THE CONSTITUTION OF THE UNITED STATES AGAINST STATE LEGISLATION TO IMPAIR IT."

Walla Walla v. *Walla Walla Water Co.*, 172 U.S. at page 9:

. . . "It is sufficient for the purposes of this case to say that this court has too often decided for the rule to be now questioned, that a grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of its service by the grantee, is the grant of a franchise vested in the State, in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the Constitution of the United States against state legislation to impair it. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U.S. 650, 660; *New Orleans Water Works Co.* v. *Rivers*, 115 U.S. 674; *St. Tammany Water Works* v. *New Orleans Water Works*, 120 U.S. 64; *Crescent City Gas Light Co.*

v. *New Orleans Gas Light Co.*, 27 La. Ann. 138, 147.

"It is true that in these cases the franchise was granted directly by the state legislature, but it is equally clear that such franchises may be bestowed upon corporations by the *municipal* authorities, provided *the right to do so is given by their charters*."

Third Proposition of Law.

WHERE A MUNICIPAL CORPORATION — A CITY — MAKES, UNDER LEGISLATIVE AUTHORITY, A CONTRACT WITH A PRIVATE CORPORATION, GIVING THE LATTER THE EXCLUSIVE RIGHT TO FURNISH SUCH CITY WITH GAS OR WATER, ANY SUBSEQUENT LAW PASSED BY THE STATE LEGISLATURE AUTHORIZING SUCH CITY TO FURNISH ITSELF, DURING THE LIFE OF SUCH CONTRACT, WITH GAS OR WATER, OR TO OBTAIN THE SAME FROM ANY THIRD PERSON OR CORPORATION, IMPAIRS THE OBLIGATION OF SUCH CONTRACT; AND IS THEREFORE UNCONSTITUTIONAL AND VOID.

See authority under Second Proposition above.

Fourth Proposition of Law.

ANY LAW WHICH ABRIDGES, OR IN ANY MANNER CHANGES THE INTENTION OF THE PARTIES RESULTING FROM THE STIPULATIONS IN THE CONTRACT, NECESSARILY IMPAIRS THE OBLIGATION OF SUCH CONTRACT. *A fortiori*, A LAW WHICH EXTINGUISHES OR DESTROYS A CONTRACT IMPAIRS THE OBLIGATION OF SUCH CONTRACT.

2 Story on Constitution (5th ed.) sec. 1385:

"In the next place, What may properly be deemed impairing the obligation of contracts in the sense of the Constitution? It is perfectly clear, that any law, which enlarges, ABRIDGES, *or in any manner changes the intention of the parties*, resulting from the stipu-

lations in the contract, necessarily impairs it. The manner or degree in which this change is effected can in no respect influence the conclusion; for whether the law affect the validity, the construction, the duration, the discharge, or the evidence of the contract, it impairs its obligation, though it may not do so to the same extent in all the supposed cases. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are a part of the contract, however minute or apparently immaterial in their effect upon it, impairs its obligation. *A fortiori, a law which makes the contract wholly invalid, or extinguishes, or releases it, is a law impairing it.* . . . The obligation to perform a contract is coeval with the undertaking to perform it."

Sturges v. *Crowninshield*, 4 Wheat. at pages *197, 198:

"In discussing the question whether a state is prohibited from passing such a law as this, our first inquiry is, into the meaning of words in common use — what is the obligation of a contract? and what will impair it? . . . A contract is an agreement, in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. . . . *Any law which releases a part of this obligation, must, in the literal sense of the word, impair it. Much more must a law impair it, which makes it totally invalid, and entirely discharges it.*"

Green v. *Biddle*, 8 Wheat. 2:

(From headnote:) . . . "*The invalidity of a state law, as impairing the obligation of contracts, does*

not depend upon the extent of the change which the law effects in the contract."

(From Opinion, pp. *84, 85:) . . . "Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute, or apparently immaterial, in their effect upon the contract of the parties, impairs its obligation."

Fifth Proposition of Law.

WHERE A CONTRACT HAS BEEN MADE UNDER AUTHORITY CONFERRED BY A STATE STATUTE, ANY LAW WHICH SUCH STATE AFTERWARDS MAKES, AND WHICH INTERFERES WITH OR TAKES AWAY, THE POWER OF ANY PARTY TO SUCH CONTRACT TO PERFORM ITS TERMS, IMPAIRS THE OBLIGATION OF SUCH CONTRACT.

See —

Von Hoffman v. *Quincy*, 4 Wall. at pages 554, 555:

"It is well settled that a state may disable itself by contract from exercising its taxing power in particular cases. It is equally clear that *where a state has authorized a municipal corporation to contract* and to exercise the power of local taxation to the extent necessary to meet its engagements, *the power thus given cannot be withdrawn until the contract is satisfied. The state*, and the *corporation*, in such cases, *are equally bound.* The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute: and *neither the state nor the corporation can any more impair the obligation of the contract in this way than in any other.*"

We submit, upon the same principle, that as the state of Massachusetts authorized the City of Newburyport to

make a contract for a full supply of water for fire purposes and the corporation made such contract, "the state and the *corporation* [that is, the City of Newburyport] . . . are equally bound," and neither can do anything which will prevent a corporation from fulfilling its promises which are necessary to enable it to obtain the payment promised by the city for the performance of such promises. *Any such prevention under any subsequent statute would necessarily be an impairment of the obligation of such contract.*

See also the leading case of —

Curran v. *State of Arkansas*, 15 How. *304:

(From headnote:) "The bills of the bank being payable on demand, there was a contract with the holder to pay them; and these laws, which withdrew the assets of the bank into a different channel, *impaired the obligation of this contract.*"

The opinion was by Mr. Justice CURTIS:

(At page *310:) "Such were these contracts and their obligations; and *it would seem to require no argument* to prove that a law authorizing and requiring such a corporation to distribute its property among its stockholders, or transfer it to its sole stockholder, leaving its bills unredeemed, *would impair the obligation of the contracts* contained in those bills. The cases of *Bronson* v. *Kinzie et al.*, 1 How. 311; and *McCracken* v. *Hayward*, 2 id. 608, which will be more particularly adverted to hereafter, leave no doubt on that point. Indeed it has not been attempted to maintain, that such a law, operating on the property of a mere private corporation, whose charter the legislature could not repeal, would be valid. But it is argued that this is a different case. That *the legisla-*

ture has power to destroy this corporation and thereupon its contracts are no longer in existence, and cannot be enforced against the property of the corporation, which, upon the repeal of its charter, reverts to the grantors of its lands and escheats, so far as it is personalty, to the state, and that, if it be in the power of the state thus to destroy the remedies of creditors, by repealing the charter, their rights must be considered to be entirely subject to the will of the state, and no law can impair the obligation of their contracts, because subjection to any law which may be passed belongs to the very existence of such contracts. Or, to express the same ideas in different words, that the state created and can destroy the corporation and all its contracts, and, as it can thus destroy them by repealing the charter, it can modify, obstruct, and abridge the rights of creditors and the obligations of their contracts, without repealing the charter.

"*Neither these premises, nor the conclusion deduced from them, can be admitted.*"

(At pages *319, 320:) "In that case [*McCracken* v. *Hayward*, 2 How. 608] the law under consideration provided that a sale should not be made of property levied on under an execution, unless it would bring two thirds of its valuation by three householders. It was held that such a law so obstructed the remedy as to impair the obligation of the contract. *The law now in question certainly presents a far more serious obstruction*, for it withdraws the real property of the bank altogether from the reach of legal process, provides no substituted remedy, and leaves the creditor, as is truly said by the Supreme Court of Arkansas, in its opinion in this case, 'in a condition in which *his rights live but in grace, and his remedy in entreaty only.*'"

The conclusion of the court is shown by the above extract from the headnote, viz., —

> "The bills of the bank being payable on demand, there was a contract with the holder to pay them; and these laws, which withdrew the assets of the bank into a different channel, *impaired the obligation of this contract*."
>
> 15 How. 304.

When we come to apply the above settled law to the facts of this case we shall also make use of the following from the opinion in —

> *Long Island Water Supply Co.* v. *Brooklyn*, 166 U.S. at page 690: —
>
> " . . . the contract is a mere incident to the tangible property; that it is the latter which, being fitted for public uses, is condemned. And while the company, by being deprived of its tangible property, is unable to perform its part of the contract, and therefore can make no demands upon the town for performance on its part, it still is true that the contract is not the thing which is sought to be condemned, and *its impairment, if impairment there be, is a mere consequence of the appropriation of the tangible property*. Second, a contract is property, and, like any other property, may be taken under *condemnation proceedings for public use*. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U.S. 650, 673. Its condemnation is *of course subject to the rule of just compensation*."

Sixth Proposition of Law.

IN DETERMINING WHETHER OR NOT A STATUTE IS UNCONSTITUTIONAL, THE DIRECT AND NECESSARY RESULT OF A STATUTE MUST BE TAKEN INTO CONSIDERATION WHEN

DECIDING AS TO ITS VALIDITY, EVEN IF THAT RESULT IS NOT IN SO MANY WORDS EITHER ENACTED OR DISTINCTLY PROVIDED FOR. IN WHATEVER LANGUAGE A STATUTE MAY BE FRAMED, ITS PURPOSE MUST BE DETERMINED BY ITS NATURAL AND REASONABLE EFFECT.

In both the cases cited and quoted below it was decided that the statute in question was unconstitutional. It may also be observed that in each case there was a certain element of compulsion shown in the *effect* of the statute.

Collins v. *New Hampshire*, 171 U.S. 30, at pages 33, 34:

"*The direct and necessary result of a statute* must be taken into consideration when deciding as to its validity, even if that result is *not in so many* words either enacted or distinctly provided for. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect. *Henderson* v. *Mayor of New York*, 92 U.S. 259; *Morgan Steamship Co.* v. *Louisiana*, 118 U.S. 455, at 462. Although under the *wording* of this statute the importer is *permitted* to sell oleomargarine freely and to any extent provided he colors it pink, yet the *permission to sell* when accompanied by the imposition of a condition which, if complied with, will effectually prevent any sale, amounts in law to a prohibition."

Henderson v. *Mayor of New York*, 92 U.S. 259, at pages 268, 269:

"In whatever language a statute may be framed, its *purpose* must be determined by its *natural and reasonable effect*; and if it is apparent that the *object* of this statute *as judged by that criterion*, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign

shore, and landed at the port of New York, it is as much a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the Passenger Cases.

"*To require a heavy and almost impossible condition to the exercise of this right*, with the alternative of payment of a small sum of money, is, IN EFFECT, to *demand* payment of that sum. . . . It is a law *in its purpose and effect* imposing a tax on the owner of the vessel for the privilege of landing in New York passengers transported from foreign countries."

Mugler v. *Kansas*, 123 U.S. 623, at page 661:

. . . "*The courts are not bound by mere forms, nor are they to be misled by mere pretences.* They are at liberty — indeed, *are under a solemn duty* — to look at the *substance* of things, *whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority.*"

Seventh Proposition of Law.

THE RESERVED POWER DOES NOT GIVE TO THE STATE OR THE MUNICIPALITY THE RIGHT TO EXTINGUISH THE CONTRACT, ALTHOUGH BY IT THE STATE MAY HAVE THE POWER TO DESTROY THE CORPORATION.

This is distinctly held in —

Curran v. *Arkansas*, 15 How. at page *310, quoted *ante*, p. 192.

For further argument upon this point see argument under "Reserved Power," *post*, p. 211.

APPLICATION OF THE SAID PRINCIPLES OF LAW TO PLAINTIFF'S RIGHTS UNDER THE CONTRACT TO FURNISH WATER FOR FIRE PURPOSES.

We have shown the fundamental rule that the provision prohibiting the impairment of the obligation of contracts relates to and protects *all* contracts, express and implied (First Proposition of Law, *ante*, p. 187), and specifically, that any contract to supply water to a city "is a contract protected by the Constitution of the United States against state legislation to impair it." (Second Proposition of Law, *ante*, p. 188.)

Our contract is therefore protected from impairment by state legislation.

Having established —

I.

That plaintiff and defendant made, under the authority of the state, an exclusive contract for the City's water supply for fire purposes during the continuance of the contract and not exceeding twenty years, — and when the statutes of 1893 and 1894 were enacted the contract had several years yet to run, —

II.

That the act of 1894, as construed and applied, did not provide compensation for the contract;

We proceed, with the aid of the above propositions of law, to point —

III.

IF THE ACT OF 1893 WAS IN FORCE AFTER THE CITY VOTED NOT TO PURCHASE, SAID ACT IMPAIRED THE OBLIGATION OF PLAINTIFF'S SAID CONTRACT TO FURNISH THE STATE WITH A FULL SUPPLY OF WATER FOR FIRE PURPOSES DURING THE LIFE OF SAID CONTRACT.

We have shown that plaintiff's contract was exclusive both expressly and by necessary implication. (Point I., *ante*, pp. 168 *et seq.*)

We have also shown that where a municipal corporation — a city — makes, under legislative authority, a contract with a private corporation, giving the latter the ex-

clusive right to furnish such city with gas or water, any subsequent law passed by the state legislature, authorizing such city to furnish itself, during the life of such contract, with gas or water, or to obtain the same from any third person, or corporation, impairs the obligation of such contract, and is therefore unconstitutional and void. (Second and Third Propositions of Law, *ante*, pp. 188, 189.)

The act of 1893 provided that "the city of Newburyport *may supply itself* . . . with water for the extinguishment of fires," etc. (c. 471, sec. 1).

If, then (as the Circuit Court intimates, but does not determine*), the act of 1893 became operative, — although the City voted "not to purchase," here is a palpable impairment of the obligation of plaintiff's said contract. (See Second Proposition of Law, *ante*, p. 188.)

This impairment continued at least until the sale was made under the act of 1894.

And the impairment by the act of 1893 continued (*a*) if the act of 1894 was unconstitutional (and therefore void), or (*b*) if the sale under the act of 1894 was compulsory in fact and in law.

(*a*) Obviously, one unconstitutional act could not be held to validate the unconstitutionality in a previous act.

(*b*) If the sale under the act of 1894 was compulsory in law, it was not binding upon the plaintiff, and therefore such sale could not affect its right to protection against the unconstitutionality of the act of 1893.

IV.

THE ACT OF 1894 (INCLUDING THE ACT OF 1893 AS REVIVED AND AMENDED BY THE ACT OF 1894) IMPAIRED THE OBLIGATION OF SAID CONTRACT, UNLESS THE PLAIN-

*Plaintiff still claims, as argued *ante*, pp. 93 *et seq.*, that the act of 1893 was void because of said vote not to purchase.

TIFF COMPANY WAIVED ITS CONSTITUTIONAL RIGHTS BY MAKING A VOLUNTARY SALE.

THE SALE WAS NOT VOLUNTARY; BUT WAS COMPULSORY IN FACT AND IN LAW.

The act of 1894 provided that the Water Company might, within thirty days after the passage of the act, notify the City of its desire to sell its property, and that "said city shall not proceed to supply water to itself or its inhabitants under the authority of chapter 471 of the acts of 1893, unless it shall have first purchased of said Company the property aforesaid." (R. 33.)

Whether the act of 1893 became void upon the City's vote not to purchase (as we claim and show, *ante*, pp. 93 *et seq.*), or whether it continued in force up to the passage of the act of 1894, it is obvious that the act of 1894 revived or re-enacted the provisions of the act of 1893, authorizing municipal competition *unless* the Water Company should make a voluntary sale of its property to the city.

We submit, therefore, that as the act of 1893 impaired the obligation of plaintiff's contract, it follows that the effect of the act of 1894 which revived or re-enacted the former act, must have been the impairment of this contract, unless the Water Company made a voluntary sale of its property to the city.

And this follows even if plaintiff's contract was not exclusive.

For a brief consideration of the facts will show that the act of 1894, including the act of 1893 as revived and amended by the act of 1894, abridged and changed the intention of the parties resulting from the stipulations in the contract; that the effect of said legislation was to extinguish or destroy said contract; that, although said contract had been made under authority conferred by said act of 1880, the act of 1893 and the act of 1894 jointly and severally interfered with and took away the power of the

plaintiff to perform its terms, any one of which results would be an impairment of the obligation of plaintiff's contract.

See Fourth, Fifth, and Sixth Propositions of Law, *ante*, pp. 189 *et seq.*

Municipal competition meant ruin, and ruin would have rendered the plaintiff Company unable to perform its part of the contract to furnish water for fire purposes, and would therefore have destroyed plaintiff's right to demand of the City the annual rental provided by the contract.

"The great injury which at this time threatened the company's property was municipal competition under the act of 1893, and the act of 1894 was passed as a protection against such *impending* DISASTER."

Opinion of COLT, J., August 8, 1900, p. 12. (R. 122.)

To same effect see cases cited in argument upon Fourteenth Amendment, Point VI., subdivision 1 (*ante*, pp. 89 *et seq*).

That impairment of the obligation of the contract is "a consequence of the appropriation of the tangible property," see —

Long Island Water Supply Co., v. *Brooklyn*, 166 U.S. at page 690, quoted under Fifth Proposition of Law, *ante*, p. 194.

Therefore, unless there was a voluntary sale by the Water Company to the City, we submit that the legislation complained of impaired the obligation of plaintiff's contract.

But the sale under the act of 1894, though voluntary in form and appearance, was compulsory in fact and in law.

We claim and submit that this proposition has been fully established under our argument upon the Fourteenth Amendment.

That argument is based, however, upon the assumption that the threat of municipal competition, in and of itself, would have been a LAWFUL *threat.*

We now undertake to show that the threat of municipal competition, in and of itself, was unlawful; because it violated the obligation of plaintiff's contract with the city, which had been made under the authorization of the State.

In the opinion rendered by the Circuit Court in this case August 8, 1900, the court assumed that the sale was compulsory *in fact.* (R. 123.)

Apparently the only reason why the Circuit Court did not decide that the legislation complained of was in violation of plaintiff's rights of due process of law under the Fourteenth Amendment was that the court held that the threat of municipal competition was a *lawful* threat. That court, in its opinion of August 8, 1900, said, —

> "In the case at bar there was no moral duress not justified by law, because it was lawful for the State to authorize, or threaten to authorize, municipal competition. There would have been a close analogy between those cases aud the present, *if the plaintiff had possessed an exclusive franchise*, and the legislature had, contrary to law, *authorized*, or *threatened* to authorize *municipal competition*. *In that event* it might have been claimed that the company was compelled to convey its property to the city under an *unlawful* exercise of legislative power, *and, therefore, under moral duress not justified by law.*" (R. 127.)

We have shown —

That plaintiff's contract was exclusive both expressly and by necessary implication. (See *ante*, pp. 168 *et seq.*)

That the act of 1894, as construed and applied, did not provide payment for the contract. (See *ante*, p. 187.)

That all contracts, whether franchises or other forms of contract, are equally within the protection of the constitutional provision (*ante*, pp. 187–188).

That the legislation complained of authorized municipal competition, and thus in effect threatened (*a*) to extinguish or destroy the contract without compensation; (*b*) to interfere with and take away the power of the plaintiff to perform its terms (*ante*, pp. 199, 200).

Wherefore we claim and submit that the case as now presented falls completely and specifically within the rule indicated in the above quotation from the Circuit Court's opinion of August 8, 1900 (R. 127), and that therefore the court should hold that *the sale under the act of 1894*, though voluntary in form and appearance, was compulsory in fact and *in law*.

And this, we submit, is true, even if the contract was *not* exclusive.

For the acts of 1893 and 1894 (as we have shown *ante*, pp. 89, 199–200) would inevitably result in the ruin of the Company, and would thus in effect not only impair the obligation of the contract, but would extinguish the contract as originally made, which was that plaintiff should furnish water during the term of the contract, unless the City should in the mean time buy out the Company *upon the terms* provided in the act of 1880. (R. 26, 27.)

Under those terms of sale the Company would have been paid for the said contract and its franchise rights to the use of the streets and to collect water rates; and, as we have shown, such payment would have prevented the impairment of the obligation of contracts, because such payment would have been in conformity with such obligation.

It it be settled law that, where there is no exclusive franchise, or exclusive contract, the state may lawfully authorize municipal competition, even if it should result in the ruin

of the local Company, we submit we have shown that such rule is subject to the following limitation; to wit, —

Where such Company has a duly authorized (exclusive or non-exclusive) contract with the municipality for an unexpired term, any new state statute which, without paying for such contract, will, in effect, abridge or extinguish the contract, or will prevent or impede the local Company's performance thereof, impairs the obligation of such contract, and is unconstitutional and void.

> See Fourth Proposition of Law, *ante*, pp. 189 *et seq.*, and Fifth Proposition of Law, *ante*, pp. 191 *et seq.*

No decision to the contrary has yet been adduced.

We submit that our claim is supported by the principles of the decisions cited and quoted; and especially by the dictum in —

> *Skaneateles Water Co.* v. *Skaneateles*, 184 U.S. 354.

The following is from the opinion: —

> *At page 364:* . . . "We can appreciate the argument that *the village had no right to build and use its own plant during the running of the five years' contract*, but we fail to see the force of the claim that, on account of once making a contract with the plaintiff for five years, the village irrevocably bound itself by an implied contract *never* to build its own plant without taking by condemnation the property of the plaintiff if the parties could not agree on terms of purchase."
>
> *At page 363:* . . . "Admitting that in every grant there is an implication that the grantor will do nothing to detract from the full and complete operation of the grant itself, we cannot find any implication that, *after the termination of the contract the plaintiff and defendant were empowered to make*, there should be no right

in the defendant to build its own system of waterworks under the statute of 1875, unless it purchased or condemned the property of the plaintiff."

At page 365 : "*When the contract for the five years had expired* we look in vain for anything in either of the statutes of 1873 or 1875 upon which to base the implied contract contended for." . . .

Wherefore we claim and submit, —

That the act of 1894 (including the act of 1893 as revived and amended by the act of 1894) impaired the obligation of said contract.

We submit the above conclusion is not changed by the decision or reasoning in the recent case of —

Joplin v. *South West Missouri Light Co.*, 24 U.S. Supreme Court Reporter (part No. 2), p. 43, decided November 16, 1903 :

Headnote : "An implied contract that the city will not, for twenty years, enter into the business of commercial electric lighting, does not arise from a municipal grant to certain persons under the authority of Mo. Laws, 1891, p. 60, of the right to erect and maintain an electric light plant for that period, where such grant is not exclusive."

This case can be readily distinguished from the present water cases, and from the principles and authorities by which we seek to hold that the contract for water for fire purposes was exclusive, both expressly and by necessary implication.

So far as appears in the Joplin case, there was no express contract between the City and the local Company, while here there was not only an express contract, authorized by the state for a term of years, but a contract which expressly provided that the plaintiff should furnish to the defendant a *full* supply of water for fire purposes, which

made such contract both expressly and by implication exclusive, as above shown.

In the Joplin case the court held (at page 44), —

> "It is by *implication* from the *statute and the ordinance passed under it, not from the explicit expression of either*, that the conclusion is deduced that the city is precluded from erecting its own lighting plant, *and yet it is conceded that the grant to the appellee is not exclusive*. That is, it is conceded the city has not exhausted its power under the statute by the grant held by appellee, but may make another to some other person than the appellee. In other words, that the city may make a competitor to appellee, but cannot itself become such competitor."

In the present case we do not need to resort to the statute for any implication. The exclusiveness of the contract arises from the terms of the contract itself, to furnish a *full* supply of water for fire purposes. Nor do we concede that the City could make a contract for water for fire purposes with any other person than the plaintiff corporation. The cases above cited show that where one contracts to furnish another with full supply, such right *is exclusive*, and we therefore submit that the Joplin case is distinguishable from the present case, and that not to hold the plaintiff's contract for water for fire purposes exclusive would be in effect to overrule the settled law as to what, at least by necessary implication, constitutes an exclusive contract.

Moreover, we submit that, by implication, what the court says in the Joplin case concerning the Skaneateles case tends to support our claim as to the impairment of the obligation of the *contract for water for fire purposes*.

The court said,—

> "It is true there was an element in that case which is not in the case at bar. The village of Skanea-

teles had entered into a contract with the water company to take water from the company. This contract had expired before the city constructed its works. *It was not that contract, however, which was alleged to have been impaired, but that which the water company claimed to have been implied by reason of its organization and incorporation*, and in pursuance of the application made to, and with the consent of, the village authorities. The ultimate reliance, therefore, of the water company was that from the *grant* to it the village impliedly contracted not to construct works of its own. The similarity of the contention with that in the case at bar is apparent."

Ibid. p. 45.

In the same line the court, after considering the Walla Walla case, said, —

"In the case at bar, restraint upon the power of the appellant city is claimed to be *implied* by the *grant* to the appellee."

Ibid. p. 45.

Our reliance in the present case is *not* upon the *grant*, but upon the *contract* made with the city under the express authority of the state statute; and we submit that under the principles of the authorities above cited by us, which are thus in effect confirmed by the above distinction in the Joplin case, it remains that the act of 1894 (including the act of 1893 as revived and amended by the act of 1894) impaired the obligation of said contract.

We submit it follows that we have established the seventh, ninth, and tenth assignments of error.

(See assignment VII., R. 132; also *ante*, p. 18; assignments IX. and X., R. 133; also *ante*, p. 19.)

V.

PLAINTIFF WAS ENTITLED TO ACT UPON THE THREAT; THE LAW DOES NOT COMPEL THE VICTIM TO WAIT UNTIL RUIN OVERTAKES HIM AND THEN LEAVE HIM TO RESORT TO A COURT OF LAW FOR DAMAGES; BUT HE IS ENTITLED TO RELIEF IN EQUITY.

That the *threat* itself (without awaiting the resulting ruin) constitutes the impairment recognized by the present court is already shown in the extract given from the said opinion of August 8, 1900, by COLT, J.:

> "There would have been a close analogy . . . if . . . the legislature had, contrary to law, authorized or *threatened* to authorize municipal competition."

This opinion is fully sustained by the opinion in—

> *Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. pp. 11–13, par. 3.

While plaintiff was *entitled* to act upon the threat, the Circuit Court has already sustained our claim that plaintiff was not *bound* to act earlier than it acted when its bill in the present case was filed.

> See also the subject of *Laches*, Point XIV., *ante*, p. 134.

VI.

1. ALTHOUGH WE HAVE ONLY ARGUED UNDER THE CONTRACT CLAUSE OF THE CONSTITUTION THAT THE PROVISIONS IN THE SAID ACTS OF 1893 AND 1894, AUTHORIZING THE CITY TO FURNISH ITSELF WITH WATER FOR FIRE PURPOSES, IS UNCONSTITUTIONAL, IT FOLLOWS THAT SAID ENTIRE ACTS WERE UNCONSTITUTIONAL AND VOID.

2. THE SPECIFIC RELIEF WHICH MAY BE FINALLY GRANTED NEED NOT BE DETERMINED NOW. IT IS SUF-

FICIENT AT PRESENT TO SHOW THAT WE MAY BE ENTITLED TO ANY FINAL RELIEF IN RESPECT TO THE PROPERTY IN ISSUE.

UNDER THE PRINCIPLES OF EQUITY WE ARE ENTITLED AT LEAST TO A CANCELLATION OF THE DEED AND A RESTORATION OF THE PROPERTY.

1. For our main argument upon this point, see Point XIII., *ante*, pp. 130 *et seq.*, which, we submit, applies *pro tanto* to the fact that the provisions of the act of 1893 contemplate that the City's authority to furnish water for fire purposes and water for domestic and other purposes is an obvious *entirety*. The language of the act confirms this claim:

> "The city of Newburyport may supply itself and its inhabitants with *water for the extinguishment of fires and for domestic, manufacturing, and other purposes*, and may establish fountains and hydrants, relocate or discontinue the same; may regulate the use of such water and fix and collect rates to be paid for the use of the same."
>
> Act of 1893, c. 471, sec. 1. Appendix, *post*.

Wherefore we claim and submit that, although we have only argued, under the contract clause of the Constitution, that the provisions in the said acts of 1893 and 1894 authorizing the City to furnish itself with water for fire purposes is unconstitutional, it follows that said entire acts were unconstitutional and void.

> See similar Point XIII. under Fourteenth Amendment, *ante*, pp. 130 *et seq.*

2. For proof of subdivision 2 of this Point VI., see Point XV., under Fourteenth Amendment, *ante*, p. 140.

VII.

THE STATE, LIKE AN INDIVIDUAL, IS ESTOPPED BY CONTRACTS MADE BY IT OR UNDER ITS AUTHORITY; AND IS ESTOPPED HERE BY THE AUTHORIZED CONTRACT FOR WATER FOR FIRE PURPOSES FROM TAKING ANY POSITION TENDING TO PREVENT THE PLAINTIFF FROM CARRYING OUT SUCH CONTRACT.

As to estoppel of the state, see —

BIGELOW on Estoppel (5th ed.) at pages 340, 341, —

"The question whether an estoppel of this kind is available against the state arose in *Commonwealth* v. *André* [3 Pick. 224]. It appeared that a committee of the legislature, duly authorized, granted by deed to Pierre Mathieu André, his heirs and assigns, with warranty, a certain tract of land. André at the time was an alien subject of France. The purchase was made for the benefit of one Billon, also a subject of France. Upon the death of these persons intestate the attorney-general, pursuant to an act of the legislature, filed an information to recover the land, alleging that it ought to escheat to the commonwealth for defect of title in any person who could by law hold it. But the court held the commonwealth estopped by its deed. 'The deed of the commonwealth,' said the Chief Justice, 'to the very persons now defending as heirs to André, to whom and to whose heirs the grant was made, is, we think, as estoppel against setting up the alienage of those persons as the ground of recovery.' And this is perhaps the better opinion." *

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* Among the cases there cited see particularly *Branson* v. *Wirth*, 17 Wall. 32, 42.

Estoppel by contract.

Ibid. at page 459:

"The first class of cases under the head of ***Estoppel by Contract***, as stated in the preceding chapter, arises where there is an actual or a virtual undertaking to treat a fact as specifically settled. Stated in full, the general rule of law appears to be this: A fact agreed or assumed to be true, as the basis of a contract, must be taken to be true specifically, until the contract itself is lawfully impeached by plaintiff or by defendant, or until some legal proceeding is taken to impeach the truth of the [supposed] fact; assuming that the contract itself is not contrary to law. In other words, supposing the contract to be lawful and binding, the party or parties [it may be one, it may be all] pledging or justly assuming the fact in question will be *estopped from taking any position, to the detriment of other parties, inconsistent with the special fact*, except for the purpose of reforming the language of a written contract and making it conform to the real terms of agreement."

We beg to quote further from the opinion in —

Commonwealth v. *André*, 3 Pick. 224, at page 225, as follows: —

"This deed must operate as a rebutter, as it would if an individual were the grantor; and with more reason, because the commonwealth is not liable to an action. The commonwealth, if the land were recovered, would feel itself bound to repay the consideration money, with interest. *This would be a claim which could not be resisted without degrading the country.*"

As the contract for water supply was made for a term of years by the express authority of the legislature, we

submit that to uphold any action authorized by a state statute which would tend to destroy the contract or to prevent the plaintiff Company from fulfilling it without compensation to the plaintiff could not be done "without degrading the country," to wit, both the state of Massachusetts which authorized the contract, and the United States, which would have failed to secure to plaintiff the guaranties of the Fourteenth Amendment and of the contract clause of the Constitution.

As to Anticipated Defences.

We have already considered the preliminary defences under the heading, "Concerning special grounds alleged by defendant," as barring plaintiff's right to be heard on the merits. (See *ante*, pp. 46 *et seq.*)

We have also considered defendant's claim of laches, Point XIV., *ante*. It remains to consider the further defences which, as they were presented in the court below, we anticipate may be urged here, namely, *the Reserved Power over Corporate Franchises*, and the *Police Power*.

Both these defences were urged in the hearings before the Circuit Court, but were disregarded, and by implication held to be invalid.

VIII.

As to the Reserved Power of Massachusetts over Corporate Franchises.

When plaintiff's bill was brought, the reserved power was contained in the Public Statutes of Massachusetts, c. 105, sec. 3, as follows: —

> "Sect. 3. Every act of incorporation passed after the eleventh day of March in the year eighteen hundred and thirty-one shall be subject to amendment, alteration, or repeal at the pleasure of the general court: but the corporation, notwithstanding such re-

peal, shall be subject to the provisions of sections forty-one and forty-two; and such amendment, alteration, or repeal shall not take away or impair any other remedy which may exist by law consistently with those sections against the corporation, its members or officers, for a liability previously incurred."

That section has now been embodied in the Revised Laws of Massachusetts, c. 109, sec. 3, which is as follows: —

"Section 3. Every act of incorporation passed since the eleventh day of March in the year eighteen hundred and thirty-one shall be subject to amendment, alteration or repeal by the general court. All corporations which are organized under general laws shall be subject to such laws as may be hereafter passed affecting or altering their corporate rights or duties or dissolving them. Corporations shall, notwithstanding such repeal or dissolution, be subject to the provisions of sections fifty-three and fifty-four. Such laws of amendment, alteration or repeal or such dissolution shall not take away or impair any remedy which may exist by law consistently with said sections against the corporation, its members or officers, for a liability previously incurred."

The defendant has hitherto claimed, and will presumably claim here, that under said reserved power the legislature had *plenary* power over the plaintiff's franchise rights, and that therefore, even if the proceedings here complained of amounted to a taking without compensation, such taking would not be in violation of due process of law under the Fourteenth Amendment, nor in violation of the clause of the Constitution relating to the obligation of contracts.

To these attempted defences, we make answer as follows: —

1. THE POWER OF THE LEGISLATURE UNDER THE RESERVED POWER IS NOT PLENARY; IT HAS ITS LIMITS.

This was conceded by Chief Justice SHAW in 1859 in —

Commonwealth v. *Essex Company*, 13 Gray, 239, at page 253.

The headnote is as follows: —

"The Essex Company, having made and maintained a fishway in their dam across the Merrimac River, to the satisfaction of the county commissioners, as required by their charter (St. 1845, c. 163,) and having duly accepted the act of 1848, c. 295, authorizing them to increase their capital stock on condition that they should be liable for all damages occasioned by their dam to the owners of the fish rights above it, and having paid large sums of money for such damages, cannot afterwards be required by the legislature, in the exercise of their power to regulate fisheries, to make different fishways; notwithstanding the Rev. Sts. c. 44, § 23, reserving to the legislature the right to amend, alter or repeal charters."

It may be observed that in the present case no claim has been made that the franchises of the Water Company have been *repealed*. Indeed, the contrary has been conceded. But it is claimed that the effect of the legislation was to *amend* or *alter* these rights under the reserved power.

A similar claim was made in the above case, *Commonwealth* v. *Essex Company*, and concerning it, Chief Justice SHAW said as follows: —

At pages 253, 254: "Does this come within the power of the legislature to *amend* or *alter*? *It seems to us that this power must have some limit, though it*

is difficult to define it. Suppose an authority has been given by law to a railroad corporation to purchase a lot of land for purposes connected with its business; and they purchased such lot from a third party; could the legislature prohibit the company from holding it? If so, in whom should it vest; or could the legislature direct it to revest in the grantor, or escheat to the public; or how otherwise?

"Suppose a manufacturing company incorporated is authorized to erect a dam and flow a tract of meadow, and the owners claim gross damages, which are assessed and paid; can the legislature afterwards alter the act of incorporation so as to give to such meadow-owners future annual damages? Perhaps from these extreme cases — for *extreme cases are allowable to test a legal principle* — the rule to be extracted is this: that where, under power in a charter, rights have been acquired and become vested, *no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted.*

"It appears to us, in the present case, that after the government, acting in behalf of the public, and also of all those riparian owners whose fish rights would be damnified by the defendants' dam, with the fishway as it was, entered into a solemn and formal contract with the defendant company to exempt them from the obligation of making and maintaining a suitable and sufficient fishway, if such were practicable, by indemnifying all parties damnified in their several fisheries, and the defendant company had executed their part of the contract by the payment of a large sum of money, it was not competent for the legislature, with-
[*254] out any change of circumstances, under *their authority to amend and alter the charter of the

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company, to pass a law requiring them to do the acts from which, by the terms of such contract, they had been exempted, and *therefore that the said act was null and void*, and this indictment founded upon it cannot be maintained."

The above case is cited in —

Watuppa Reservoir Co. v. *Fall River*, 147 Mass. 548.

The citation is in a dissenting opinion by KNOWLTON, J. (now Chief Justice).

We quote the following: —

At pages 569–570: "The right to regulate the business or repeal the charters of certain corporations, reserved in the act of March 3, 1809, to which this charter is made subject, and the similar right in the broader statute of 1831, c. 81 (Pub. Sts. c. 105, sec. 3,) have their limitations. In dealing with the latter statute, Chief Justice SHAW, in *Commonwealth* v. *Essex Co.*, 13 Gray, 239, 253, says: 'The rule to be extracted is this: that where, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted.' I am not aware that this proposition of law has ever been controverted; and there are similar intimations or statements in numerous cases in our reports, and in those of the Supreme Court of the United States. *Commonwealth* v. *New Bedford Bridge*, 2 Gray, 339, 348. *Commissioners on Inland Fisheries* v. *Holyoke Water Power Co.*, 104 Mass. 446, 451. *Parker* v. *Metropolitan Railroad*, 109 Mass. 506, 508. *Bing-*

hamton Bridge, 3 Wall. 51. *Holyoke Co.* v. *Lyman*, 15 Wall. 500, 522."

[It should be noted that the dissent is not upon any difference of opinion as to the rule formulated by Chief Justice SHAW and quoted by Mr. Justice KNOWLTON. The difference between the majority and minority of the court was upon the earlier question whether or not there was a contract. In the present case the contract is clear and admitted, namely, a contract authorized by the legislature to furnish water for fire purposes for a term of years. R. 2, 3.]

See also opinion of GRAY, J., in —

Commissioners &c. v. *Holyoke Water Power Co.*, 104 Mass. 446, at page 451.

2. THE MASSACHUSETTS RESERVED POWER IS CONTAINED, NOT IN ITS CONSTITUTION, BUT IN THE STATUTE, AND SUCH RESERVED POWER CANNOT BIND ANY SUCCEEDING LEGISLATURE WHICH MAY CHOOSE TO MAKE A CONTRACT NOT SUBJECT TO BE ALTERED OR REPEALED.

New Jersey v. *Yard*, 95 U.S. 104, at pages 111, 112.

3. "THE POWER TO ALTER OR AMEND DOES NOT EXTEND TO THE TAKING OF THE PROPERTY OF THE CORPORATION EITHER BY CONFISCATION OR INDIRECTLY BY OTHER MEANS."

The above principle is a quotation from the opinion in —

Lake Shore &c. Ry. Co. v. *Smith*, 173 U.S. 684, at page 698.

In that case it was argued that the reserved power to repeal, alter, and amend included the power to regulate rates; and that a statute effecting such regulation would

therefore not be deemed unconstitutional.* In that case the court said, —

> *At page 698:* "The power to enact legislation of this character cannot be founded upon the mere fact that the thing affected is a corporation, even when the legislature has power to alter, amend or repeal the charter thereof. *The power to alter or amend does not extend to the taking of the property* of the corporation *either by confiscation* or *indirectly* by other means."

And the court held that such attempted statutory regulation was "a violation of that part of the Constitution of the United States which forbids the taking of property without due process of law."

Ibid. p. 699.

The defendant's argument in the present case is similar to that which was condemned in the above case. The language of the acts of 1893 and 1894 shows no direct attempt to alter or amend the charter of the Water Company.

We claim to have shown that the act of 1893 was void by the City's vote not to purchase; and in that case the

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* [It is interesting to note that one of the arguments was that the Company had voluntarily contracted to do in other directions substantially what the statute compelled it to do. Upon this point the court said, —

> "What the company may choose voluntarily to do furnishes no criterion for the measurement of the power of a legislature. *Persons may voluntarily contract to do what no legislature would have the right to compel them to do.*"]

173 U.S. at page 697.

only possible alteration in the Company's rights was the price to be paid for its property. The original legislation had provided that the city might buy at the full price; the act of 1894 provided that the Water Company should be paid for only part of its property, which, under the constitutional provision requiring just compensation could never have been required. We submit that the language of the court above quoted is peculiarly applicable here: "The power to alter or amend does not extend to the taking of the property of the corporation *either by confiscation or indirectly by other means.*"

4. WHERE A CONTRACT HAS BEEN MADE UNDER THE AUTHORITY OF A STATE THE RESERVED POWER CANNOT BE EXERCISED UNTIL THE CONTRACT IS SATISFIED.

Although the legislature has, generally speaking, power to destroy the corporation, the exercise of such power would nevertheless be an impairment of the obligation of contracts.

See Fifth Proposition of Law, *ante*, p. 191, and the cases there cited and quoted.

[Of course the contract can be "taken" like other property, *if paid for.*]

5. THE GREENWOOD CASE.

The case of —

Greenwood v. *Freight Co.* 105 U.S. 13, —

is constantly cited against us. It is readily distinguishable from the Newburyport and Gloucester cases.

The corporation in the Greenwood case having the same relative position as the Water Company was the Marginal Freight Company.

The corporation having the position corresponding to that of the City, was the Union Freight Company.

The Union Freight Company *received all its franchises directly from the legislature* by chapter 342 of the acts of 1872.

By the same act, sec. 7, the *charter of the Marginal Freight Company was absolutely repealed*, and all its franchise rights were thus taken away from it.

In the case of the Union Freight Company, *the language of the act admits no possible claim of construction that the Union Freight Company received its franchises, or any of them, from the Marginal Freight Company.*

Note that the reserved power is that every act of incorporation shall be subject to "*amendment, alteration or repeal.*" The Greenwood case was a case of absolute *repeal.*

Acts of 1872, c. 342, sec. 7:

> "Chapter one hundred and seventy of the acts of the year eighteen hundred and sixty-seven, entitled an act to incorporate the Marginal Freight Railway Company, and so much of chapter four hundred and sixty-one of the acts of the year eighteen hundred and sixty-nine, as relates to said Marginal Freight Railway Company, are hereby *repealed.*"

See Appendix, *post.*

Had similar language been used in our Water Company cases, we could not have made the claim which we have made, and which Judge COLT assumes, namely, that the cities received some of their franchises from the water companies.

But the *charters of the water companies were not repealed*, and no such claim has been made.

The cities tried hard enough to get straight unencumbered water charters from the legislature, but the legislature refused to grant them. Instead of so doing, it adopted the device of making the water companies appear to make a voluntary sale. But, inasmuch as the legislature forced

the water companies to include franchise rights in the sale, and provided no compensation for such franchise rights, it seems inevitable, notwithstanding the decision of the Circuit Court, that the compulsion in fact was also compulsion in law; because it included an element of illegality; namely, the compulsion to convey *all* of our property and to accept in payment the value of only *part* of our property, and thus in effect took part of our property without providing just compensation or any compensation.

In order that the court may verify our claims as to the legislation in the Greenwood case, we have placed in the appendix hereto copies of the Massachusetts statutes involved.

Applying the foregoing principles to our claims both under the Fourteenth Amendment and under the contract clause of the Constitution, we claim and submit, —

First. That obviously the legislature of Massachusetts made no attempt to either amend, alter, or repeal the charter or franchise rights of the plaintiff corporation, and therefore any claim by the defendant as to the operation of the reserved power in this case is untenable.

Second. That if there were any legislative attempt to use the reserved power to alter or amend, it was an attempt to do so either by confiscation, or indirectly by other means, which will not be permitted.

> *Lake Shore &c. Ry. Co.* v. *Smith*, 173 U.S. at page 698, quoted *ante*, p. 216.

Third. In any event the contract for water supply for fire purposes for a term of years was, as already shown (*ante*, 210), inviolable during such term.

Fourth. We have already shown (*ante*, Point VII., p. 209) that the state and its agent, the defendant municipal corporation, were estopped by such contract from taking any position inconsistent therewith.

Wherefore we claim and submit that the Circuit Court was justified in disregarding the attempted defence under the reserved power, and that such defence should not be sustained here.

IX.

AS TO THE POLICE POWER.

The defendant has hitherto claimed that the legislation complained of is justified on the ground of the police power, and that the legislation is valid under such power, even if the result was a taking without compensation as complained of.

The Circuit Court held in the present case that "the taking complained of in this case was . . . *not* under the guise of taxation or *police regulation*." (R. 116.) We claim, therefore, that this defence is not open to the defendant herein, who has taken no appeal and filed no assignment of error. As, however, the court may not allow this claim, we offer the following argument upon the questions involved therein: As the present court has declined to give a comprehensive definition of the police power, but has held, in effect, that each case must be judged by itself, we can only present such principles as the court has already laid down, and which we think should govern the present case.

1. *No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment even under the police power.*

Connolly v. *Union Sewer Pipe Co.*, 184 U.S. 540, at page 558:

> "The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the State, which, as often stated by this court, were not included in the grants

of power to the General Government, and therefore were reserved to the States when the Constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the States to the contrary notwithstanding, a statute of a State, *even when avowedly enacted in the exercise of its police powers, must yield to that law*. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, *whatever* may be the source from which the power to pass such enactment may have been derived. 'The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law.' The State has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Sinnot* v. *Davenport*, 22 How. 227, 243; *Missouri, Kansas & Texas Railway* v. *Haber*, 169 U.S. 613, 626."

The same principle was expressed in —

Allgeyer v. *Louisiana*, 165 U.S. at page 591, as follows: —

. . . "To deprive the citizen of such a right as herein described without due process of law is illegal. Such a statute as this in question is not due process of law, *because it prohibits an act which under the Federal Constitution the defendants had a right to perform*. This does not interfere in any way with the acknowledged right of the State to enact such legis-

lation in the legitimate exercise of its police or other powers as to it may seem proper. In the exercise of such right, however, care must be taken not to infringe upon those other rights of the citizen which are protected by the Federal Constitution."

2. *As the police power apparently permits, in some instances, the taking or destruction of property by the State, without compensation, in order to permit such result it must be clearly ascertainable by the court from the statute that it was an intended exercise of the police power.*

Mugler v. *Kansas*, 123 U.S. 623, at pages 660, 661:

"But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are per-
*661 mitted to do as they *please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.

"It does not at all follow that every statute enacted *ostensibly* for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, *Sinking Fund Cases*, 99

> U.S. 700, 718, the courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. 'To what purpose,' it was said in *Marbury* v. *Madison*, 1 Cranch, 137, 176, 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' *The courts are not bound by mere forms, nor are they to be misled by mere pretences.* They are at liberty — indeed, are under a solemn duty — to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute *purporting* to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a *palpable invasion of rights* secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

Note that the court here assumes that where a statute is really enacted to secure the objects within control of police power it will be enacted —

> "*ostensibly* for the promotion of these ends. . . . If, therefore, a statute *purporting* to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a *palpable invasion of rights* secured by the fundamental law, it is the duty of the

courts to so adjudge, and thereby give effect to the Constitution." (Ibid. 661.)

Obviously, the police power is frequently used as a conspicuous shield to protect the state against the limitations of the federal Constitution, and particularly of the Fourteenth Amendment and the contract clause of the Constitution.

It has remained to the present defendants and their counsel to set up a claim, in effect, that the state's most efficient weapon, the police power, has been wielded and concealed under the guise of an [alleged] voluntary sale.

We submit that if the legislature had intended to pass the statute of 1894 under the police power the statute would have contained the usual evidences of such intent, such, for example, as appeared in the legislation in —

Stein v. *Bienville Water Supply Co.*, 141 U.S. at pages 74, 75:

"The Bienville Water Supply Company was incorporated by an act approved February 19th, 1883, which was amended by an act approved February 14th, 1885. *The preamble recites that 'whereas the inhabitants* of the municipality known as the Port of Mobile, and the inhabitants of the village of Whistler, in the County of Mobile, *are not provided with an adequate supply of water for domestic and municipal purposes; and whereas, it is essential to the public health* of the citzens of those towns, *and to the protection of their property* and the public property therein, against conflagration, that an abundant supply of water should be introduced and furnished to said citizens; and whereas, a company of citizens of said county propose to undertake the duty of furnishing such supply to said towns for the public use and benefit.'"

If it be claimed here that the statute of 1894 was passed under the "police power" of the state, we answer further:

1. That the only fact giving any color to this claim is plaintiff's use of the Merrimac River water.

2. That it is admitted that the company used this water only from June, 1892, to some time in March, 1893. (R. 89, 90.)

The act of 1893 was approved June 10, 1893. (R. 40.)

The act of 1893 became void when the city voted *not* to purchase, August 25, 1893. (R. 5.)

There is no proof that the legislature of 1894 enacted the statute of 1894 because of the company's use of the Merrimac River water, which had been discontinued in *March, 1893*.

3. In any event, the act of 1894 cannot be construed as an act to prevent the improper use of the Merrimac River water. Our ground of complaint is that under the act the most valuable part of our property is taken without any compensation; and that cannot be constitutionally done, even as a punishment for a wrong.

So far as defendant seeks by these facts to justify any legislative attempt to punish the Water Company, they are incompetent, irrelevant, and immaterial; because the legislature has no constitutional power to punish the Water Company by compelling it to take less than full value for all its property. If the Company has done wrong in using the property, that wrong should be redressed in a *direct action therefor, and cannot be made a factor in condemnation proceedings.*

The above propositions are clearly and vigorously stated by BREWER, J., in *Ames* v. *Union Pacific Ry. Co.*, 64 Fed. Rep. 165.

What he says there concerning railroad companies obviously applies equally to water companies:

"Property invested in railroads is as much protected from public appropriation as any other. If taken for public uses, its value must be paid for. Constitutional guaranties, to this extent, are explicit; and in such condemnation proceedings no inquiry is permitted as to how the owners have acquired the property, provided only it be legally held by them. If a farm belong to an individual, and the public seeks to take it, it must pay its value, and is not permitted to diminish the price by proving the owner acquired the means of purchase by immoral or disreputable practices. He may have made his fortune dealing in shares, as a lobbyist, or in any other way obnoxious to public condemnation; but, if he has acquired a legal title to the property, he is protected in its possession, and cannot be disturbed until the receipt of its actual cash value. The same rule controls if railroad property is sought to be appropriated. No inquiry is open as to whether the owner has received *gifts from State* or individuals, *or whether he has, as owner, managed the property well or ill, or so as to acquire a large fortune therefrom. It is enough that he owns the property* — has the legal title — *and, so owning, he must be paid the actual value of the property.* **If he has done any wrong in acquiring or using the property that wrong must be redressed in a direct action therefor, and cannot be made a factor in condemnation proceedings.** These propositions in respect to condemnation proceedings are so well settled that no one ever questions them. *The same general ideas must enter into and control* LEGISLATION *of the kind before us.* The value of the property cannot be destroyed by *legislation depriving the owner of adequate compensation.*"

Ames v. *Union Pacific Ry. Co.*, 64 Fed. Rep. at page 175.

4. The absurdity of any claim that the Merrimac water episode had anything to do with the act of 1894 is shown by the fact that the legislature passed a similar act in reference to the City of Gloucester and the Gloucester Water Company.

See chapter 451 of acts of 1895, — particularly sec. 16.

See Appendix hereto, p. 30.

5. Obviously the injection of the Merrimac water episode into this case is for the purpose of accomplishing what is forbidden by law, namely, the examination of the *motives* actuating the law-making body, it being claimed, we anticipate, that this episode furnished one of the "reasons" for the legislation complained of. Such reason, we submit, is obviously merely a *motive*, especially as the legislation resulting is not in the line with legislation under the police power, where the objects to be accomplished are visibly and "ostensibly" the promotion of the public health, safety, etc. The legislation here complained of shows not a trace of intent to exercise the police power. The use of the Merrimac River ceased before the act of 1893 was passed, and there is no indication that its resumption was ever even threatened. The City had the power to stop it promptly by injunction even when it was used. The act of 1894 prescribed no regulations for the health or safety of the public or any part thereof; and if the Merrimac River matter had anything to do with the legislation, it furnished at most to some of the legislators a motive for punishing the Water Company by the compulsory sale in the act of 1894, under which it would be deprived of its most valuable rights without compensation. *Such motives cannot be shown or taken into consideration.*

"MOTIVES OF LEGISLATURE. — It is not within the province of the judiciary to inquire into the motives actuating the law-making body."

6 Amer. & Eng. Encyc. of Law (2d ed.) p. 1087, giving a long list of federal and state authorities containing (note 5), *inter alia*, —

Ex Parte McCardle, 7 Wall. 514.

Doyle v. *Continental Ins. Co.*, 94 U.S. 535.

The obvious fact is that such legislation is part of the new socialistic movement, whereby the attempt is being made to deprive corporations of some of their most valuable property without paying for it. The attempt to get property by governmental authority without paying for it is old, — so old that the provision against such attempts was inserted in *Magna Charta*, and thence was adopted in our federal and state Constitutions. But the present *form* of the attempt is novel; and is intended to accomplish the unlawful, unconstitutional end under such forms of law as may delude the courts.

See Gl. R. 17.

For summary and conclusion in both the Newburyport and Gloucester cases, see post, p. 272.

The Gloucester Case.

The statement of this case appears *ante*, pp. 20 *et seq.*

Jurisdiction.

The statement of jurisdictional facts appears *ante*, p. 20.

The Circuit Court had Jurisdiction.

The argument upon this point is similar to the argument in the Newburyport case upon the like point; q.v., *ante*, pp. 36 *et seq.*

The appeal was properly made directly from the Circuit Court to the Supreme Court; and was seasonably taken and entered. (See jurisdictional facts, *ante*, p. 20.)

The appeal was taken, entered, and docketed within two years — in fact within one year — from the date of the final decree in the Circuit Court.

That the appeal was properly made and seasonably taken and entered appears in the argument, *ante*, pp. 44 *et seq.*

Concerning Special Grounds Alleged by Defendant as Barring Plaintiff's Right to be Heard on the Merits.

These grounds are covered by those treated in the argument on the Newburyport case, *ante*, pp. 46 *et seq.*

Concerning the Alleged Violation of the Fourteenth Amendment.

General Statement of Plaintiff's Grievance Under the Provision of the Fourteenth Amendment Relating to "Due Process of Law."

Mutatis mutandis, our general statement here is the same as the general statement in the Newburyport case (*ante*, p. 2).

Plaintiff's grievance as to "due process of law" is, shortly stated, that, although the sale under chapter 451 of the Massachusetts acts of 1895* was *voluntary in form*, it was *compulsory in fact and in law;* that such compulsory sale constituted *in effect a taking* of plaintiff's property; that that statute, as construed by the Supreme Court of Massachusetts, provided for compensation for only *part* of the property taken; that the part for which no compensation whatever was provided consisted of certain franchise rights which were of the value of more than $900,000; that the taking of such part of our property without compensation was in violation of plaintiff's rights under the Fourteenth Amendment to the Constitution of the United States, as hereinafter shown.

Bearing in mind that there is no opinion in the Circuit Court in this case excepting the mere rescript of the court stating, "This case in our opinion is governed by the case of *The Newburyport Water Company* v. *The City of Newburyport*, and the demurrer to the bill is therefore sustained," (Gl. R. 89) — we call attention to the fact that, because this case was held to be so governed, the opinions in the Newburyport case are set forth as part of the record in the Gloucester case. (See Gl. R. 93, 98, 113.)

The Main Distinctions between the Newburyport and Gloucester Cases.

1. In the Gloucester case there was only one statute authorizing or purporting to authorize municipal competition, to wit, chapter 451 of the acts of 1895; while in the Newburyport case there were two, the act of 1893 and the act of 1894, and much complication and discussion resulted therefrom. The city of Newburyport claims that the act

* This is erroneously indexed in the record as page 40. It appears at page 48.

of 1893 went into effect notwithstanding the City's vote not to purchase, and that the City received its water franchise rights from the act of 1893; while the Newburyport Water Company claims that because of such vote the act of 1893 did not become effective, and that only under the act of 1894, including the act of 1893 as re-enacted by the act of 1894, did the City receive any water franchise rights, and that then it acquired the Water Company's franchises by the sale under the act of 1894. No such issue or dispute is possible in the Gloucester case, because the municipal competition and the sale or transfer were authorized in one and the same act; and it will therefore all the more readily appear that the City received the Water Company's franchise rights under the sale or transfer provided by the act.

2. There is no Merrimac River episode in the Gloucester case, nor anything else from which it could be inferred that there was any ground, reason, or motive in depriving the Water Company of its franchise rights without compensation, except the palpably mercenary motive that the municipality wished to get them for nothing.

3. From the very beginning of the Gloucester legislative contest the City showed its desire and intention to obtain, if possible, the property of the Gloucester Water Supply Company without paying for any of its franchise rights.

In 1893, instead of purchasing the property of the Company in accordance with the provisions of the act of 1881, and the contracts made thereunder, the City attempted to secure the passage of an act authorizing it to construct and operate competing water works and with no obligation to buy out the Water Company. In its petition to the legislature the City asked for authority to take by purchase or otherwise, the waters of *any* pond, stream, or well within the limits of the City; thus requesting, not only the means of competing with the Water Company, but of taking any or all of the Water Company's supply. (Gl. R. 5, 6, 31, 32.)

4. The record history of the Gloucester legislative contest shows a persistent attempt on the part of the City to procure legislation within the lines of the Greenwood case (which is discussed *ante*, p. 218), namely, to procure its franchise rights directly from the legislature and to purchase from the Water Company only the latter's physical property. This was, in effect, what was attempted above (3).

5. Failing in this, and after the Newburyport act of 1894 was passed, the City of Gloucester next tried to procure legislation which, though including a sale, should limit the purchase to the physical property and be free from the doubts in reference to the construction of the statute which were inevitable in the Newburyport case.

The City failed also in this. The act as passed differs materially from the act finally presented by the City; yet the bill finally offered in behalf of the City aids in the construction of the act as passed, — as will be shown in the argument herein.

We shall also show that this legislation makes the Gloucester case free from the tedious question in the Newburyport case as to whether or not the City received its water franchises from the state in an earlier act.

6. It will also appear from the record history of the act that the sale provided therein was intended by the legislature to include the Water Company's franchise rights and all its other property, including all its contracts.

7. Such history will also show that it furnished to the plaintiff ground for the hope and expectation that the state court would finally construe the statute as requiring payment for all the Company's property, including the franchise rights, and therefore furnish also ground for awaiting the final determination of the state court before bringing the present suit.

8. It will be shown that the commissioners and the single justice of the state court were both doubtful as to

the construction of the statute, the single justice reserving all questions thereon for the full court; and thus was furnished additional argument justifying the plaintiff in awaiting the decision of the full court.

9. The decision of the full court was rendered June 19, 1901 (Gl. R. 16), and plaintiff's bill herein was filed within a fortnight thereafter, to wit, July 1, 1901.

10. The *form* of the transfer in the Gloucester act tends to confirm our claim that the sale was obviously compulsory and was a taking by the state.

The transfer of title was to be made *without a deed!*

The Water Company had only to notify the mayor of the City in writing of its desire to sell its property to the City and file with the city clerk a specification and description thereof; and if the City voted to buy, then the transfer of title was made by the sovereign fiat of the state statute enacted for this case alone:

> "Said property shall thereupon become the property of said city." (Gl. R. 53.)

The state and City thus avoided compelling the Company to go through the farce and untruth of performing the universal legal requirement, viz., that a deed, to be recorded in Massachusetts, should contain the solemn acknowledgment that it was the vendor's *free* act and deed.

See Point VII., *post*, p. 253.

Our argument in the Gloucester case is by reference to the corresponding points in our argument upon the Newburyport case, with such additions and changes as are required and permitted by the distinctions between the two cases.

If the cases were identical, it would only be necessary to refer to our entire argument in the Newburyport case; but there are distinctions which we claim are of benefit to the plaintiff in each case; and, except where these dis-

tinctions occur, we beg to refer to the argument in the Newburyport case as constituting our argument upon similar points in the Gloucester case.

In our previous argument upon the Fourteenth Amendment the first five points are wholly points of law which we claim to be equally applicable to the Gloucester case; and therefore we beg to adopt by reference said points as our argument *pro tanto* in the Gloucester case. For convenience, we here repeat the headings of these five points, which are as follows: —

I.

"DUE PROCESS OF LAW," UNDER THE FOURTEENTH AMENDMENT, REQUIRES COMPENSATION TO BE MADE OR SECURED TO THE OWNER OF PRIVATE PROPERTY TAKEN UNDER THE AUTHORITY OF THE STATE FOR PUBLIC USE.

THIS PROVISION CONTROLS A TAKING, WHATEVER MAY BE ITS FORM OR GUISE. (*Ante*, p. 59.)

II.

AS TO WHAT CONSTITUTES A TAKING UNDER THE FOURTEENTH AMENDMENT.

WHATEVER THE PROVISIONS OF THE STATE STATUTE, WE ARE ENTITLED TO GO BEHIND THE FORM AND TO SHOW THAT WHAT WAS AUTHORIZED BY THE STATUTE AS CONSTRUED BY THE STATE COURT WAS, IN EFFECT OR IN SUBSTANCE, A TAKING OF PLAINTIFF'S PROPERTY WITHOUT COMPENSATION, UNDER THE FORM OR GUISE OF A SALE WHICH WAS APPARENTLY VOLUNTARY, BUT WHICH WAS IN REALITY COMPULSORY IN FACT AND IN LAW. (*Ante*, p. 62.)

III.

IT IS NOT ONLY SETTLED AS ABOVE SHOWN (II.) THAT THE OWNER OF PRIVATE PROPERTY MAY BE DEPRIVED OF IT BY STATE ACTION IN ANY FORM WHICH IS IN EFFECT OR IN SUBSTANCE A TAKING THEREOF; BUT —

IT IS ALSO SETTLED THAT A SALE WHICH IS COMPULSORY IN LAW UNDER A STATE STATUTE IS THE EQUIVALENT OF A TAKING BY THE STATE. (*Ante*, p. 67.)

IV.

IT RESULTS FROM THE THREE PRECEDING POINTS THAT DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT REQUIRES COMPENSATION TO BE PAID OR SECURED TO THE OWNER OF PRIVATE PROPERTY SOLD TO A MUNICIPAL CORPORATION FOR PUBLIC USE BY A SALE WHICH, AS REGARDS SUCH OWNER, IS COMPULSORY IN LAW UNDER THE STATE STATUTE WHICH AUTHORIZES SUCH SALE. (*Ante*, p. 68.)

V.

AS TO WHAT CONSTITUTES LEGAL COMPULSION, AND ESPECIALLY COMPULSION BY A GOVERNMENT OR ITS OFFICERS; AND AS TO THE KIND OF COMPULSION WHICH CONSTITUTES DURESS, AND RENDERS INVOLUNTARY IN LAW (AS WELL AS IN FACT) WHAT APPEARS TO BE VOLUNTARY.

WHILE ORDINARILY WHAT MAY BE LAWFULLY DONE MAY BE LAWFULLY THREATENED, YET IF THE GOVERNMENT, OR AN OFFICER OF THE GOVERNMENT ACTING UNDER COLOR OF OFFICE, THREATENS AN INDIVIDUAL WITH SERIOUS LOSS, UNLESS THE INDIVIDUAL WILL MAKE A CONTRACT TO DO SOMETHING NOT REQUIRED BY LAW, AND IF THE CONTRACT IS MADE UNDER THE INFLUENCE OF SUCH THREAT, SUCH CONTRACT, THOUGH VOLUNTARY IN APPEARANCE, BECOMES THEREBY COMPULSORY IN FACT AND IN LAW AND IS OBTAINED BY DURESS. (*Ante*, pp. 68 *et seq.*)

In addition to the argument upon the similar point, *ante*, pp. 68, 72, we beg to note that a person may be punished heavily under the criminal laws of Massachusetts, who, in writing, threatens what, without threat, he could lawfully *do*, viz., cause the arrest of the guilty party.

The statute providing for such punishment is as follows:

Mass. Rev. Laws, c. 207, sec. 25:

"Section 25. Whoever, verbally or by a written or printed communication, maliciously threatens to accuse another of a crime or offence, or by such communication maliciously threatens an injury to the person or property of another, with intent thereby to extort money or any pecuniary advantage, or with intent to compel the person so threatened to do any act against his will, shall be punished by imprisonment in the state prison for not more than fifteen years, or in the house of correction for not more than ten years, or by a fine of not more than five thousand dollars, or by both such fine and imprisonment."

The corresponding section in the General Statutes of Massachusetts was section 28 of chapter 160, which was as follows: —

"Sect. 28. Whoever, either verbally or by a written or printed communication, maliciously threatens to accuse another of any crime or offence, or by such communication maliciously threatens an injury to the person or property of another, with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do any act against his will, shall be punished by imprisonment in the state prison not exceeding fifteen years, or in the house of correction not exceeding ten years, or by fine not exceeding five thousand dollars, or by such imprisonment and fine."

Under this statute it was held that the offence may be committed in an endeavor to obtain only that which is justly due to the defendant. See, —

Commonwealth v. *Coolidge*, 128 Mass. 55.

It is worth noting here that, whereas the defendant in its petition for rehearing in the Newburyport case (by which this case is "governed") complained that the Circuit Court did not allude to or appear to have considered the many citations made by defendant upon the questions of compulsion and duress (Newburyport R. pars. 4, 5, pp. 98, 99), the Circuit Court did not thereafter cite any of defendant's cases upon compulsion or duress.

The Circuit Court considers in its opinion the four cases of governmental compulsion cited by *plaintiff*.

> "In the Supreme Court cases *relied on by the plaintiff* it will be found that the compulsion or duress was based upon an illegal act or exaction, or threatened illegal act or exaction, by the Government or its officers."

The court then examines "the Supreme Court cases relied on by the plaintiff" as follows: —

> *United States* v. *Tingey*, 5 Pet. 115, 129. (R. 124.)
> *Maxwell* v. *Griswold*, 10 How. 242. (R. 125.)
> *Swift Co.* v. *United States*, 111 U.S. 22, 28. (R. 125.)
> *Robertson* v. *Frank Brothers Co.*, 132 U.S. 17. (R. 126.)

The Circuit Court then purports to deduce from them its rule upon the crucial point; yet we submit to the examination of the present court that *compulsion in law* as well as in fact *was held in all of them;* that *in none of them is there, either expressly or by implication, any such rule as the rule apparently deduced by the Circuit Court*, that what may be lawfully done may be lawfully threatened; and especially that **in the first of them, the Tingey case, the**

rule laid down by the Supreme Court of the United States is precisely in effect the rule as we have formulated it; to wit, —

> As to what constitutes legal compulsion, and especially compulsion by a government or its officers; and as to the kind of compulsion which constitutes duress, and renders involuntary in law (as well as in fact) what appears to be voluntary.
>
> While, **ordinarily,** what may be lawfully done may be lawfully threatened, yet if the government, or an officer of the government acting under color of office, threatens an individual with serious loss, unless the individual will make a contract to do something not required by law, and if the contract is made under the influence of such threat, such contract, though voluntary in appearance, becomes thereby compulsory in fact and in law, and is obtained by **duress.** (See Point V., *ante*, pp. 68 *et seq.*)

We submit, therefore, that in the Newburyport case, and even more clearly in the Gloucester case, the general rule as thus qualified was *ignored* by the Circuit Court in these two cases; that, as we have shown, the rule laid down in the Tingey case was expressly adopted by the Supreme Court of Massachusetts more than a generation ago (*ante*, p. 81), and is to-day the rule of both the federal courts and the courts of Massachusetts (*ante*, pp. 81–82); and that the plaintiffs in these two cases are entitled to the full benefit and application of it here.

VI.

Application of the foregoing principles of law to the present case.

A.

The government, that is, in this case, the commonwealth of Massachusetts, by the act of 1895

(c. 451), IN EFFECT THREATENED THE PLAINTIFF WITH SERIOUS LOSS UNLESS THE PLAINTIFF WOULD BY AN APPARENTLY VOLUNTARY SALE AND CONTRACT DO SOMETHING NOT REQUIRED BY LAW.

B.

THE PLAINTIFF, UNDER THE INFLUENCE OF SUCH THREAT, DID WHAT WAS REQUIRED AS ABOVE; TO WIT, MADE THE APPARENTLY VOLUNTARY SALE PROVIDED FOR IN THE ACT OF 1895, WHICH SALE INCLUDED THE DISPUTED FRANCHISE RIGHTS FOR WHICH PLAINTIFF RECEIVES NO COMPENSATION.

C.

THE SALE BECAME THEREBY COMPULSORY IN LAW.

See particularly Point VI. in the Newburyport case, *ante*, pp. 85 *et seq.*, with the corresponding subdivisions.

The above Point VI. is treated with the following subdivisions: —

A.

That the government, that is, in this case, the commonwealth of Massachusetts, by the act of 1895 (c. 451), in effect threatened the plaintiff with serious loss unless the plaintiff would by an apparently voluntary sale and contract do something not required by law. (See *ante*, p. 86.)

We are entitled to show the substance and effect of the statute, and also its purpose, but not the motives of the legislature. (See *ante*, p. 86.)

"The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty — indeed, are under a solemn duty — to look

at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority." (See *ante*, p. 88.)

It is likewise true that questions of duress are to be determined not merely upon the form of the language used, but upon what was said or done IN EFFECT. (See *ante*, p. 89.)

1. The municipal competition authorized by the statute meant serious loss to the plaintiff company, to wit, its inevitable damage and ruin.

See particularly *ante*, p. 89.

It is also to be noted that in the Gloucester case the following facts were alleged in the bill and *admitted by the demurrer*; viz., —

"*the loss and ruin which would inevitably result from such municipal competition* authorized under said chapter," etc. (Gl. R. 17.)

2. The statute (1895, c. 451) provided that the sale from the Water Company to the City should comprise, inter alia, the Water Company's following franchise rights: —

The franchise right to take additional sources of supply in ward 8 in said city;

The franchise right to lay and maintain pipes in the streets of said city;

The franchise right to charge water rates for water supplied to said city and its inhabitants. (Gl. R. 11.)

Such franchise rights were the PROPERTY of the Water Company.

It is not denied (as we understand it) that the terms of the statute, both naturally and technically, would includ-

what plaintiff claims above; and the claims which the City of Newburyport made upon the corresponding point (*ante*, p. 93) would be obviously untenable if made here.

Those claims were that the statute cannot be construed to include franchise rights in the sale, —

(*a*) Because the Supreme Court of the state adopted the contrary construction, which is binding upon the Supreme Court of the United States.

(*b*) Because the city received a complete water franchise by the act of 1893, and was in possession of it thereunder when the act of 1894 was passed.

(*a*) As to the possible claim that the Supreme Court of the state construed the Gloucester act as not including the franchise rights in the sale, we submit that in the Gloucester case there is nothing in the opinion of the state court tending to sustain such claim.

The full court sustained the award of the commissioners except as to some relatively small points not involved herein. (Gl. R. 87.)

The commissioners expressly excluded from valuation "the franchise rights" and gave as the reason for so doing, — not that they did not pass under the statute, — but simply that, whatever property was included in the sale was "property which the Company can no longer use, but the city can, and is to pay a fair value upon these conditions," namely, that the "value shall be estimated without enhancement on account of future earning capacity, of future goodwill, or on account of the franchise of said Company." (Gl. R. 13.)

In considering the same question the full court simply treats the franchise rights as not to be paid for, but makes no suggestion that they were not included in the sale.

The obvious reason for this omission is that the language of the act at this point is so plain as to interpret itself; that ALL *property, rights, and privileges* of the Water Com-

pany were included in the sale, and that the city was not to proceed to exercise any water rights "unless it shall have *first* purchased from said Company the property aforesaid."

(*b*) As to (*b*), — that the City of Newburyport received a complete water franchise by the act of 1893 and was in possession of it thereunder when the act of 1894 was passed.

Obviously, no such point can be made in the Gloucester case, because the only act relating to municipal competition and to the sale complained of was the act of 1895, which provided both for municipal competition and for the sale by which the effect of such competition could be avoided.

Moreover, the record history of the Gloucester legislative contest adds greatly to the strength of our contention that the statute should be construed as including the Water Company's franchise rights in the sale.

For in 1894 the City renewed the attack in the legislature, and offered a bill accompanying the petition of the mayor of Gloucester. (Gl. R. 37.) Although in this bill it limited the power to take waters to those not heretofore taken or purchased by the Gloucester Water Supply Company within the limits of said City, the bill was not favorably acted upon by the legislative committee (Gl. R. 8); and another bill was drawn and substituted in the legislature at the instance of said City by its duly authorized agent or agents. (Gl. R. 8.) The latter bill appears Gl. R. 43. Section 16 provides for a sale (Gl. R. 47), and *it should be noted that the enumeration of what is to pass by the sale expressly excludes all such general words as rights, privileges, or franchises, and includes only such terms as would clearly limit the purchase to the physical plant of a water company.* Not content with this limitation, the bill also expressly provided that "said commissioners in determining the value of said property *shall*

not take into account the franchise of said company, the value of the City of Gloucester and its inhabitants as a market for the sale of water, nor the income theretofore earned by said Company, nor the earning capacity of said property, but shall only ascertain the fair value for use by said City of the specific property hereinbefore named which shall have been conveyed as aforesaid." (Gl. R. 47, 48.) If the bill had been enacted in that form it would probably have been idle to contend that the franchise rights of the Water Company passed by any sale under the act.

But the bill as enacted changed the enumeration which in the act complained of *begins with precisely the general terms which the framers of the bill in behalf of the City were careful to exclude from the act.*

Extract from the bill substituted at the instance of the City. (Gl. R. 47.)

"*Section 16.* At any time within thirty days after this act shall have been accepted by the City of Gloucester, as hereinafter provided, the Gloucester Water Company may notify the mayor of Gloucester in writing that it desires to sell to said city its lands, easements, waters, water rights, reservoirs, pipes, hydrants, tools and all apparatus used in supplying the inhabitants of Gloucester with water, and execute and deliver to said city

Extract from chapter 451 of the acts of 1895, Section 16. (Gl. R. 53.)

"*Section 16.* If within thirty days after this act shall have been accepted by the City of Gloucester, as hereinafter provided, the Gloucester Water Supply Company shall notify the mayor of the city of Gloucester in writing that it desires *to sell to said city* [*all the corporate property* and *all the rights, privileges,**] easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures,

[*The terms which we have placed in the brackets do not appear in the bill.]

proper deeds and instruments, in writing, conveying to said city the property aforesaid, whereupon the property thus conveyed shall become the property of the city of Gloucester." . . .

hydrants, tools and all appliances owned by said company, and used in supplying said city and the inhabitants thereof with water, and shall file with the city clerk of said city a specification and description thereof, *said city shall not proceed to supply water to itself or its inhabitants under the authority of this act, unless it shall have* FIRST *purchased of said company the property aforesaid;* and said company is authorized to make sale of said *property* to said city, and said city is authorized to purchase the same and manage and use the property thus conveyed for the purposes and under the provisions of this act." . . .

Since, therefore, the legislature had before it a bill limiting the sale to the physical plant of the Water Company, but added to such description of what was to be sold the terms "all the corporate property and all the rights, privileges," we submit it is obvious without argument that such sale was intended by the legislature to include the Water Company's franchise rights and all its other property, including all its contracts.

This contention is not weakened by a reference to any other part of the act. On the contrary, such reference strengthens it, because it is provided that, under the con-

ditions named, "said city shall not proceed to supply water to itself or its inhabitants, under the authority of this act, unless it shall have *first* purchased of said Company the property aforesaid; and said Company is authorized to make sale of *said* property to said City, and said City is authorized to purchase the *same*."

These rights of the Company were franchises, and were thus the property of the Water Company.

Boston &c. v. *Salem &c.*, 2 Gray, at page 35, and cases cited.

See also —

Williston Seminary v. *County Commissioners*, 147 Mass. at page 430.

Monongahela Navigation Co. v. *United States*, 148 U.S. at pages 327, 328.

Wherefore we submit we have shown that the statute (1895, c. 451) provided that the sale from the Water Company to the City should comprise, inter alia, the Water Company's following franchise rights: —

The franchise right to take additional sources of supply in ward 8 in said City;

The franchise right to lay and maintain pipes in the streets of said City;

The franchise right to charge water rates for water supplied to said City and its inhabitants. (Gl. R. 11.)

Such franchise rights were the PROPERTY *of the Water Company.*

3. The sale provided by the statute included something not required by law; that is, it included franchise rights belonging to the Company, which, under the terms of the sale, though included therein, were not to be paid for. Such a sale could not be required by law.

We have shown in the preceding subdivision 2 that, under the statute, the sale included the Company's franchise rights.

No compensation was made or secured by the statute to the Water Company for a valuable part of the property included in the sale, viz., the Company's said franchise rights.

The commissioners reported, —

> "We have not considered the past, present or prospective income, good will, or the franchise rights." (Gl. R. 13.)

The Water Company had claimed that the value of the franchise rights was, in fact, covered by and included in the value and amount of the earnings and income of the plaintiff Company. (Gl. R. 11, 12.)

The full court sustained the commissioners in excluding these franchise rights, covered in fact by income as aforesaid, from valuation. (Gl. R. 87.)

Wherefore it results that no compensation was made or secured by the statute to the Water Company for a valuable part of the property included in the sale, viz., the Company's said franchise rights.

In short, the statute provided that the Water Company should sell and convey its franchise rights to the City without receiving any compensation therefor.

That there is and can be no law requiring the Company to do this goes without saying.

On the contrary, *the right to just compensation for private property is at the very foundation of our jurisprudence;* and the sacredness of this right has caused the United States Supreme Court to read into, and make part of the phrase "due process of law" in the Fourteenth Amendment, the provision requiring compensation for private property taken for public use. (See *ante*, Point I.)

Wherefore we submit it is established that the sale provided by the statute included something not required by law; that is, it included franchise rights belonging to the Company which under the terms of the sale, though included therein, were not to be paid for. Such a sale could not be required by law.

Summary of the Foregoing.

We have shown that we are entitled to go behind the form of the statute, and to show what it was in substance and effect.

We have shown that questions of duress are likewise to be determined, not merely upon the form of the language used, but upon what was said or done *in effect*.

In order, then, to show what the statute was in effect, we have shown further as follows: —

1. The municipal competition authorized by the statute meant serious loss to the Company, to wit, its inevitable damage and ruin.

2. The statute (1895, c. 451) provided that the sale from the Water Company to the city should comprise, *inter alia*, the Water Company's following franchise rights: —

> The franchise right to take additional sources of supply in ward 8 in said City.
>
> The franchise right to lay and maintain pipes in the streets of said City.
>
> The franchise right to charge water rates for water supplied to said City and its inhabitants. (Gl. R. 11.)

Such franchise rights were the *property* of the Water Company.

3. The sale provided by the statute included something not required by law; that is, it included franchise rights belonging to the Company which, under the terms of the sale, though included therein, were not to be paid for.

Such a sale could not be required by law.

Wherefore we submit that the authorization in the statute of municipal competition conditioned upon the Company's making such sale, which could not be required by law, was in effect that the government, the Commonwealth of Massachusetts, by the act of 1895, threatened the plaintiff with serious loss unless the plaintiff would, by an apparently voluntary sale and contract, do something not required by law, — different from that required by law.

That such statutory declaration of impending loss or ruin may be properly termed a threat, is indicated by the opinions of both the Massachusetts Court and the Circuit Court referred to.

See quotation *ante*, p. 111, where it also appears that the Circuit Court's reasoning is a holding, in effect, that the authorization of municipal competition was a threat.

Duress by Submission to "Choice of Evils."

Moreover, under the decisions of the present court, duress may be caused by a declaration of a probable or a certain evil to come, giving to the party threatened a *choice of evils*.

A submission "merely as a choice of evils" was held, in —

Robertson v. *Frank Brothers Co.*, 132 U.S. 17, at page 22, —

not to destroy the involuntary character of the act.

Coercion is intensified when the greater evil is that unless the party submits he must "discontinue the business," which is certainly the case where the corporation will inevitably be ruined. (Ibid. p. 23.)

B.

The plaintiff made the sale under the influence of such threat.

This is alleged as a fact in the bill, and is admitted by the demurrer.

The allegation is as follows: —

> "19. Plaintiff further says that . . . such sale and transfer and the said acts of the plaintiff, — its officers, agents and stockholders, in reference thereto, were influenced and compelled by said threat." (Gl. R. 17.)

C.

The sale became thereby compulsory in law.

For we submit it is established under Point V., —

While *ordinarily* what may be lawfully done may be lawfully threatened, yet if the government, or an officer of the government, acting under color of office, threatens an individual with serious loss, unless the individual will make a contract to do something not required by law, and if the contract is made under the influence of such threat, such contract, though voluntary in appearance, becomes thereby compulsory in fact and in law, and is obtained by duress.

Conclusion of this Point.

And we submit that under the present point we have established all the above essentials of legal compulsion or duress, to wit: —

A.

The government, that is, in this case, the Commonwealth of Massachusetts, by the act of 1895 (c. 451), in effect threatened the plaintiff with serious loss unless the plaintiff would by an apparently voluntary sale and contract do something not required by law.

B.

The plaintiff, under the influence of such threat, did what was required as above, to wit, made the apparently voluntary sale provided for in the act of 1895, which sale included the franchise rights for which plaintiff receives no compensation.

We submit it follows, as a necessary conclusion, that—

C.

The sale became thereby compulsory in law.

We submit it likewise follows that we have established and sustained the third, fourth, and fifth assignments of error.

"III.

The court erred in this:

That, although it held that the sale of the Company's property was compulsory in fact, it held that such sale was not compulsory in law.

IV.

The court erred in this:

That it did not hold that the act of 1895, being chapter 451 of the Massachusetts Acts of 1895, was compulsory in law as well as in fact, and constituted duress.

V.

The court erred in this:

That it held, in effect, that the threatened grant to the defendant, The City of Gloucester, of the competing franchise under said act of 1895 (being chapter 451 of Massachusetts Acts of 1895) was a lawful exercise of legislative power." (Gl. R. 115.)

Anticipated Defences to the Foregoing.

For reply to these, and examination of cases heretofore cited by defendant upon duress, in anticipation that the same cases may be cited, — see *ante*, pp. 115 *et seq.*

The state court's opinion that "the sale to the City was not obligatory on the Water Company;" with the subsidiary statements that "the franchise of the Gloucester Water Supply Company was not an exclusive franchise;" and that "the Company was given the option of selling its property to the City" — is not binding upon the present court, which, according to its own decisions, must construe the statute for itself.

Opinion of LORING, J., Gl. R. 85.

For it is to be remembered that in the proceeding then before the state court the Water Company had no right to raise the issue whether the statute was unconstitutional or not, or whether for any reason it was valid or not. The court and the plaintiff were both bound to assume, *in that proceeding*, that the act was valid and constitutional.

See —

Pitkin v. *Springfield*, 112 Mass. 509, at page 511.

Moore v. *Sanford*, 151 Mass. 285, at page 287.

And yet under *Moore* v. *Sanford*, *ubi supra*, the plaintiff had and has the right to question the constitutionality in another proceeding such as the present; and that right carries with it the right to try the questions material thereto, which "by necessary inference" (151 Mass. 287) plaintiff was obliged to admit in the proceedings under the statute. Under these circumstances, obviously, the opinion of the state court upon the above quoted points which plaintiff could not there contest is not binding in the present proceeding. See —

Carroll v. *Lessee of Carroll*, 16 How. 275, at pages 286, 287.
St. Louis R.R. v. *Terre Haute R.R.*, 145 U.S. 393, at pages 403, 404.
Pollock v. *Farmers Loan & Trust Co.*, 157 U.S. 429, at page 575.

VII.

THAT THE COMPANY FILED WITH THE CITY CLERK OF SAID CITY "A SPECIFICATION AND DESCRIPTION" OF THE PROPERTY COMPRISED IN THE SALE IS IMMATERIAL. THE SALE REMAINS COMPULSORY IN FACT AND IN LAW.

Our corresponding point under the Newburyport case was as follows: —

That the Company gave a deed which was voluntary in form is immaterial.

The sale remains compulsory in fact and in law.

See Point VII., *ante*, p. 119.

For authorities in support of this point, see *ante*, pp. 119 *et seq.*; and we submit that those authorities are applicable, *à fortiori*, to the Gloucester case.

Moreover, it is important to note that the *form* of the transfer in the Gloucester act tends to confirm our claim that the sale was obviously compulsory and was a taking by the state.

In the Newburyport act (c. 474 of 1894) it was provided that the sale should be accompanied and evidenced by a deed, — which is the universal way in which a voluntary sale of real estate is carried out, — the statute expressly providing that "said Company shall, within twenty days after the vote aforesaid, execute and deliver to said City such proper *deeds* and instruments in writing, conveying to said City the property aforesaid, and said property thus conveyed shall thereupon become the property of said City." (R. 87.)

But in the Gloucester act, although terms of *sale* are used, the transfer was to be made by operation of the statute alone, and **without a deed.**

The Gloucester Water Supply Company was required merely to notify the mayor of Gloucester in writing that it, the Water Company, desired to sell to said City (Gl. R. 53); and, instead of carrying out such sale by deed, all else that the Water Company was required to do was to "file with the city clerk of said city a *specification and description thereof;*" that is, of all the corporate property and all the rights, privileges, etc.

In short, *all the Water Company was required to do was to make it* **appear** *that it was willing to sell all its property, and to furnish for record a complete specification of all its property;* and the state of Massachusetts, by virtue of its sovereign power, declared that, in this specific case, **without any deed whatever,** all the Water Company's corporate property, rights, privileges, etc., *should thereupon be vested in the City.*

We claim that, in *substance* and *effect*, the transaction was a taking by the state, and we submit that **even in FORM** it was more nearly a taking than a sale. For **it omitted the absolute universal requisite of a private voluntary sale, to wit, a DEED conveying the Company's real estate.**

This is all the more significant when we realize that the City would need a record title to the real estate, and that

Under the laws of Massachusetts no deed can be recorded unless it contains a solemn acknowledgment before a justice of the peace or other magistrate that it was the **free** *act and deed of the grantor.*

Pub. Sts. of Mass. c. 120, secs. 5, 6:

"Sect. 5. *No deed shall be recorded* unless there is indorsed upon or annexed to it a certificate, made as hereinafter provided, of its acknowledgment or of the proof of its due execution, and such certificate shall

be recorded at length with the deed to which it relates; but this section shall not apply to conveyances from the United States.

"Sect. 6. The acknowledgment of a deed shall be by the grantors or one of them, or by the attorney executing the deed, and, if made in this commonwealth, shall be made before a justice of the peace or notary public; if in any other portion of the United States, before a justice of the peace, notary public, magistrate, or commissioner appointed for the purpose by the governor of this commonwealth; and, if in a foreign country, before such a justice, notary, magistrate, or commissioner, or before a minister or consul of the United States or a consular officer of the United States accredited to such country; and the officer before whom an acknowledgment is made shall indorse a certificate of such acknowledgment upon the deed, or annex the same thereto."

Moreover, it is worth noting that in 1894 the legislature of Massachusetts had passed —

"An Act to establish a law uniform with the laws of other States for the acknowledgment and execution of written instruments."

Chapter 253 of the acts of 1894.

So far as deeds of corporations are concerned, the provisions of this act are as follows: —

"*Be it enacted, etc., as follows:*

"SECTION 1. Either the forms of acknowledgment now in use in this state, or the following, may be used in the case of conveyances or other written instruments, whenever such acknowledgment is required or authorized by law for any purpose; . . . 3. In the case of corporations or joint stock associations: On this

day of 18 , before me appeared A B, to me personally known, who, being by me duly sworn (or affirmed), did say that he is the president (or other officer or agent of the corporation or association) of (describing the corporation or association), and that the seal affixed to said instrument is the corporate seal of said corporation (or association), and that said instrument was signed and sealed in behalf of said corporation (or association) by authority of its board of directors (or trustees), and said A B acknowledged said instrument to be *the* **free** *act and deed of said corporation* (or association). (In case the corporation or association has no corporate seal, omit the words 'the seal affixed to said instrument is the corporate seal of said corporation (or association), and that,' and add, at the end of the affidavit clause, the words 'and that said corporation (or association) has no corporate seal.') (In all cases add signature and title of the officer taking the acknowledgment.)"

That the gist of every acknowledgment of a deed in Massachusetts has been and is an acknowledgment that the deed is the "**free** *act and deed*" of the grantor, is, we submit, known or knowable to the court as a matter of judicial notice, and as such can be verified from Crocker's Notes on Common Forms, first, second, third, and fourth editions.

We submit to the court that it is a fair inference that the legislature in 1895 had knowledge of the litigation then going on between the Newburyport Water Company and the City of Newburyport, and intentionally refrained from requiring of the Gloucester Water Supply Company, or any of its officers, the farcical and obviously untrue acknowledgment before a magistrate that a deed under such sale was the **free** act and deed of the Company.

VIII.

THE SALE, WHICH WAS COMPULSORY IN LAW, WAS FOR A PUBLIC USE OF THE PROPERTY.

That the sale was for such use is not disputed, and it is likewise settled law.

See Point VIII. under Newburyport case, *ante*, p. 120.

IX.

BY SUCH COMPULSORY SALE PLAINTIFF'S PROPERTY WAS TAKEN.

See Point IX. under Newburyport case, *ante*, p. 121.

We submit that this point is strengthened and confirmed by the peculiar provision in the Gloucester statute TRANSFERRING TITLE WITHOUT A DEED.

See Point VII. of this (Gloucester) case, *ante*, p. 253.

X.

THE PROPERTY OF PLAINTIFF WAS TAKEN UNDER COLOR OF THE AUTHORITY OF THE STATE OR COMMONWEALTH OF MASSACHUSETTS.

See Point X. under Newburyport case, *ante*, p. 124.

XI.

THE PLAINTIFF, A PRIVATE CORPORATION, IS A "PERSON" WITHIN THE FOURTEENTH AMENDMENT.

See Point XI. under Newburyport case, *ante*, p. 128.

XII.

IT RESULTS FROM THE PRECEDING POINTS THAT THE PLAINTIFF HAS BEEN DEPRIVED OF ITS PROPERTY BY THE STATE OR COMMONWEALTH OF MASSACHUSETTS WITHOUT DUE PROCESS OF LAW.

THE ERROR SPECIFIED IN THE FIRST ASSIGNMENT OF ERROR (*post*, p. 259) IS THEREFORE SHOWN; AND THE DECREE OF THE CIRCUIT COURT SHOULD BE REVERSED.

1. The sale involved in the present suit, though voluntary in form, as provided by the act of 1895, was *compulsory in law*. (See *ante*, Points I.–VI.), this conclusion being reached in subdivision C of Point VI. *ante*, p. 250.)

2. The compulsory sale was for a *public use* of the property. (See *ante*, Point VIII. p. 257.)

3. By such compulsory sale plaintiff's property was *taken*. (See *ante*, Point IX. p. 257.)

4. The property was taken under color of the authority of the state or commonwealth of Massachusetts under said act of the legislature of Massachusetts of 1895. (See *ante*, Point X. p. 257.)

5. The taking is without just compensation, to wit, is without ANY compensation. (See *ante*, Point VI. A, 3, p. 246.)

6. Under the Fourteenth Amendment "due process of law" requires compensation to be made or secured to the owner of private property taken for public use. See *ante*, Point I. p. 235.)

7. The plaintiff corporation is a "person" under the Fourteenth Amendment. (See *ante*, Point XI. p. 257.)

8. And finally, these constitute all the essentials required to establish our claim that the provisions of the act of 1895 relating to the sale and conveyance of the Water Company's rights (*a*) to take additional sources of supply in ward 8 in the city of Gloucester; (*b*) to lay and maintain pipes in the streets of said city; and (*c*) to charge water rates for water supplied to said city and its inhabitants, are in violation of the Fourteenth Amendment. (See *ante*, Points I.–IV. pp. 235–236.)

We submit it likewise follows that we have established

and sustained the first, second, and sixth assignments of error: —

"I. The court erred in this: That it held that the plaintiff has not been deprived of its property without due process of law in violation of the fourteenth amendment to the Constitution of the United States.

"II. The court erred in this: That it held that the plaintiff failed to establish a taking of its property without just compensation under the authority of the state.

"VI. The court erred in this: That it did not hold that by said act of 1895 (c. 451 of Massachusetts Acts of 1895), as construed and applied as alleged in plaintiff's bill in this suit, the State or Commonwealth of Massachusetts deprived and deprives plaintiff of its property without due process of law, in violation of the fourteenth amendment to the Constitution of the United States and of plaintiff's rights thereunder. (Gl. R. 115.)

XIII.

THE PROVISIONS OF THE ACT OF 1895 CONSTITUTE AN "ENTIRETY."

THE PART OF THE ACT WHICH WE HAVE SHOWN TO BE UNCONSTITUTIONAL CANNOT BE SEPARATED FROM THE REMAINDER WITHOUT VIOLATING THE OBVIOUS INTENT OF THE STATUTE.

THE ENTIRE ACT IS THEREFORE UNCONSTITUTIONAL AND VOID.

Upon this point we beg to rely upon the authorities and argument under similar Point XIII. in the Newburyport case (*ante*, p. 130).

XIV.

AS TO DEFENDANT'S CLAIM OF LACHES.

Mutatis mutandis, we submit that our argument under similar Point XIV. in the Newburyport case (*ante*, p. 134) covers and meets defendant's claim of laches.

If, however, defendant should claim that the prior decision of the state court in the Newburyport case required the Gloucester Company to proceed to test the constitutionality of the act of 1895, without waiting for the final decision of the state court, we answer that the peculiar features in the history of the Gloucester legislation furnished to the plaintiff ground for the hope and expectation that the state court would finally construe the statute as requiring payment for all the Company's property, including the franchise rights, and therefore furnished also ground for awaiting the final determination of the state court before bringing the present suit.

For we have shown above, —

First. That municipal competition was authorized *in the same act which provided for the sale*, thus preventing the possibility of the city's claiming, as in the Newburyport case, that the municipal competition was authorized in an act which preceded the act authorizing the sale.

Second. We have further shown that the legislature had before it a bill limiting the sale to the physical plant of the Water Company, and that the legislature prefixed to the City's enumeration of what the Water Company should sell to said City the terms, "*all* the *corporate property* and *all the rights, privileges*," etc., as shown above in Point VI., A, 2, of this (Gloucester) case. (*Ante*, pp. 243-245.)

The statute thus in terms provided that all the corporate property, and all its rights and privileges, should be included in the sale; and, being free from the possibility of claim that the city had previously acquired the franchise rights from the state, it presented to the state court *a different and stronger case than the Newburyport for claiming that all the Company's property should be paid for under the statute.* Moreover, the Newburyport case was the first upon the subject, and the decision in that single case could not therefore be regarded by the next litigant as settled law.

Plaintiff's bill contains the following allegations: —

"21. Plaintiff *further avers upon information and belief*

(*a*) That the said act of 1895 (chap. 451) was *novel;* that *the only act at all resembling* it in the terms of the so-called 'sale' was the Massachusetts act of *1894* (chap. 474) the effect and constitutionality of which are still in litigation. —

(*b*) That it is the policy and practice of the Federal courts not to pass upon the constitutionality of statutes while there remains an opportunity for the adoption of such construction of the statute involved as would avoid the point or points upon which such constitutionality is questioned. —[1]

(*c*) That it was open to said full court to hold, as claimed before it by said company that said company was entitled under said act of 1895 (chap. 451) to compensation from said City for all its, the said company's property except its franchise to be a corporation, and thereby to obviate all questions of constitutionality raised and sought to be raised in, by and under this bill. —

(*d*) That it was not open to the plaintiff company to contend before said commissioners and before said full court that said legislation was unconstitutional; —[2]

(*e*) That by proceeding as aforesaid before said commissioners and said full court plaintiff did not waive its right to contend in the proper court or courts that said legislation violated plaintiff's constitutional rights,[3] but on the contrary, plaintiff says that it has always claimed that if said act of 1895 (chap. 451)

[1] Point XIV. Newburyport case, *ante*, p. 138.

[2] Point XIV. Newburyport case, *ante*, pp. 139, 140. *Pitkin* v. *Springfield*, 112 Mass. 509, 511.

[3] Point XIV. Newburyport case, *ante*, p. 140. *Moore* v. *Sanford*, 151 Mass. 285, 287.

should be construed and applied as it has been by said commissioners and by said full court, (as hereinbefore alleged, par. 17 and par. 18) the said act is unconstitutional and void.

(*f*) That no decree or judgment has yet been entered upon the said award; and no payment thereunder has been made or tendered to plaintiff."

Gl. R. 17, 18.

So far as the above allegations are allegations of fact, they are admitted by the demurrer.

So far as they are allegations of law, they are established by the decisions hereinbefore cited.

The action of the Commissioners and of the Single Justice of the State Court.

The commissioners specially reported their construction of the act.

That the Gloucester Company was justified in deferring the bringing of the present bill until after the decision of the final state court is further shown by the fact that the same commissioners who had acted in the Newburyport case, while following generally the decision in the Newburyport case (Gl. R. p. 12), felt so doubtful about the valuation of the franchises, as represented by the income in the Gloucester case, that they specially reported the question and said that if they were wrong the question of valuation should be reconsidered. (Gl. R. 14.)

From the commissioners the case went to a single justice of the Supreme Court, who did not decide the question of valuation as he would have done had it been free from doubt, but reserved it and other questions for the full court. (Gl. R. 16.)

The single justice reserved the construction for the full court.

Wherefore we submit it is obvious that the Gloucester Company was justified in awaiting the decision of the full court before bringing the present bill. If that court had construed the statute as entitling the plaintiff to full compensation for all its property, then, although the sale was compulsory in fact and in law, and constituted a taking, yet as such taking, under the authority of the state, would have been for public purposes and would have provided for full, that is, just, compensation, the compulsory sale or taking would have been constitutional.

The decision of the full court was rendered June 19, 1901 (Gl. R. 16), and plaintiff's bill herein was filed *within a fortnight* thereafter, to wit, July 1, 1901. (Gl. R. 1.)

XV.

THE SPECIFIC RELIEF WHICH MAY BE FINALLY GRANTED NEED NOT BE DETERMINED NOW. IT IS SUFFICIENT AT PRESENT TO SHOW THAT WE MAY BE ENTITLED TO ANY FINAL RELIEF IN RESPECT OF THE PROPERTY IN ISSUE. WE HAVE SHOWN THAT THE ENTIRE ACT OF 1895 IS UNCONSTITUTIONAL; THAT ALL ACTION THEREUNDER IS VOID. THE ENTIRE COMPULSORY SALE THEREUNDER WAS VOID. AND UNDER THE PRINCIPLES OF EQUITY WE ARE ENTITLED AT LEAST TO A RESTORATION OF THE PROPERTY AND A DECREE IN EQUITY WHICH SHALL REMOVE THE CLOUD UPON PLAINTIFF'S TITLE ARISING FROM FILING SUCH "SPECIFICATION" WHICH MIGHT BE HELD, BY FORCE OF THE PECULIAR PROVISIONS OF THE ACT OF 1895, TO BE TANTAMOUNT TO A DEED.

See corresponding Point XV. in the Newburyport case, *ante*, p. 140.

"Praying general relief is sufficient."

Story's Eq. Pl. (10th ed.) sec. 41, and note 1, p. 38.

As the decision of the Circuit Court in this case was upon the demurrer, we beg to submit also the following: —

Law Relating to Demurrer.

1. *If any part of the bill is good, and entitles the plaintiff to relief, the demurrer should not be sustained in whole or in part; but should be wholly overruled.*

It will be seen upon inspection of the demurrer (Gl. R. 87–88) that, although the defendant assigns several grounds of demurrer, yet each and every ground is assigned as a demurrer to *the entire bill*.

> "If any part of a bill in equity is good, and entitles the complainant to relief or discovery, a demurrer to the whole bill cannot be sustained."
>
> *Livingston* v. *Story*, 9 Pet. 632, 658.

> "It is an established and universal rule of pleading in chancery, that a defendant may meet a complainant's bill by several modes of defence. He may demur, answer and plead to different *parts* of a bill. . . . But if he demurs to the whole bill, the demurrer must be overruled."
>
> Ibid. at page 658.

> "*The principle of equity pleading is universal, that a general demurrer to the whole bill must be overruled if any independent part of the bill is sufficient.*"
>
> *Atwill* v. *Ferrett*, 2 Blatch. 39, 48.

> "The demurrers in this case are to the whole bill. *If any part of the bill is good the demurrers fail.*"
>
> From opinion of BLATCHFORD, J., *Pacific R. R. of Mo.* v. *Missouri Pac. Ry.*, 111 U.S. 520.

Stewart v. *Masterson*, 131 U.S. 151.
See also Story's Eq. Pleading (10th ed.) secs. 443, 444.

Wherefore we claim and submit that if any part of the bill is good, and entitles the plaintiff to relief, the demurrer should not be sustained in whole or in part, but should be wholly overruled.

2. *The determination whether any part of the bill is good, and entitles the plaintiff to relief or discovery, should be made under the following rules:—*

(*a*) The demurrer should not be sustained unless it is absolute, certain, and clear that, taking the charges in the bill to be true, the bill would be dismissed at the hearing.

(*b*) The demurrer must be founded on some strong point of law, which goes to the absolute denial of the relief sought, and not on circumstances in which a minute variation may incline the court either to grant, modify, or refuse the application.

(*c*) If, from the circumstances stated in the bill, it appears that the result *might depend upon the effect of the evidence at a hearing*, the demurrer should be overruled.*

(*d*) A demurrer for want of equity cannot be sustained unless the court is satisfied that no discovery or proof properly called for by, or founded upon, the allegations in the bill, can make the subject matter of a suit a proper cause for equitable cognizance.

See Daniell's Chancery Pl. & Pr. (6th Am. ed.) vol. 1, pp. *542, 543, and cases there cited.
Story's Equity Pleading (10th ed.) sec. 528.

* See *Kansas* v. *Colorado*, 185 U.S. 125, pp. 145–147.

We submit it follows that we have established and sustained the twelfth, thirteenth, and fourteenth assignments of error, which are as follows: —

"XII. The court erred in this: That it sustained the defendant's demurrer to plaintiff's bill.

"XIII. The court erred in this: That it ordered, adjudged and decreed that the plaintiff's bill be dismissed, with costs to the defendant to be taxed by the clerk.

"XIV. The court erred in this: That it did not overrule the defendant's demurrer." (Gl. R. 116.)

XVI.

As to the decision of the Circuit Court sustaining the demurrer in the Gloucester case.

It has already been stated that the only thing in this case in the nature of an opinion was "the rescript," stating, "This case, in our opinion, is governed by the case of *The Newburyport Water Company* v. *City of Newburyport* and the demurrer to the bill is therefore *sustained*." (Gl. R. 89.)

It is to be remembered that the demurrer in the Newburyport case was *overruled*.

The bill in the Gloucester case contained the following allegations: —

"19. Plaintiff further says that, *in effect*, said chap. 451 of the acts of 1895 *threatened said Company with municipal competition by said City, and with the loss and ruin which would inevitably result from such municipal competition* authorized under said chapter, *unless* said Company *should sell and transfer*, apparently voluntarily, to said City the said Company's property upon the terms of said chapter as construed and applied by said commissioners

(*ante*, par. 17) *and said full court* (*ante*, par. 19); that such sale and transfer and the said acts of the plaintiff, — its officers, agents and stockholders, in reference thereto, (*ante*, par. 12 and par. 13) *were influenced and compelled by said threat and were compulsory* in fact and in law." (Gl. R. 17.)

The allegation of the bill further showed, the demurrers admitted, and the opinion of the state court held, that under the construction of the act three franchise rights, even though included in the sale, were not to be paid for; to wit, —

"1. The franchise right to take additional sources of supply in ward 8 in said City;

"2. The franchise right to lay and maintain pipes in the streets of said City;

"3. The franchise right to charge water rates for water supplied to said City and its inhabitants.

"That the value of said three rights is, in fact, covered by and included in the value and amount of the earnings and income of the plaintiff Company." (Gl. R. 11, 12.)

See also Gl. R. 12–14, and 16, 17.

The above allegations are obviously both allegations of law and allegations of fact.

Similar allegations were all sustained by the Circuit Court in the Newburyport case, except the allegations that the sale and the acts of the plaintiff in reference thereto were compulsory in *law*.

That is to say, the Circuit Court held in effect that, admitting that the act of 1895 threatened the Water Company with municipal competition by the City; admitting that the statute threatened the Company with the loss and ruin which, in fact, would inevitably result from such municipal competition unless the Company should sell

and transfer apparently voluntarily to the City the Company's property upon the terms of the chapter as construed and applied by the state court; admitting that such sale and transfer and the acts of the plaintiff in reference thereto were influenced and compelled by said threat, and were compulsory in *fact*; admitting, in short, that the *sale* was compulsory in *fact*, and that the compulsion was the result of the statutory threat of the ruin which would result from municipal competition, and that the Company was given the choice of evils, namely, whether it would submit to such ruin or to the lesser evil of selling *all* of its property and receiving in payment therefor the value of only *part* of its property, to wit, the value of the physical property, but not the value of any of its franchise rights, — such sale, however compulsory in *fact*, was *not* compulsory in *law*.

And the Circuit Court's ground for this decision is its ruling upon the crucial point, in effect, that whatever may be lawfully done may be lawfully threatened. And thus again in the Gloucester case, even more conspicuously than in the Newburyport case, the Circuit Court *ignored the qualification of the general rule* — what may be lawfully done may be lawfully threatened, to wit, that while *ordinarily* what may be lawfully done may be lawfully threatened, yet if the Government, or an officer of the Government acting under color of office, threatens an individual with serious loss, unless the individual will make a contract to do something not required by law, and if the contract is made under the influence of such threat, such contract, though voluntary in appearance, becomes thereby compulsory in fact and in law, and is obtained by duress.

See Point V. of our argument upon the Fourteenth Amendment in the Newburyport case, (*ante*, p. 68 *et seq.*)

Concerning Plaintiff's Claim Under the Clause of the Constitution Relating to the Obligation of Contracts.

Our argument upon this claim is fully covered, *mutatis mutandis*, by our argument upon the similar claim in the Newburyport case, *ante*, pp. 144 *et seq.*, to Point VII., inclusive, — to which we beg to refer.

We are obliged to note, however, that the award of the commissioners in the Gloucester case does in fact include compensation for the contract for the Company's furnishing the City with water for fire purposes.

The City claimed before the commissioners that the contract subsisting October 1, 1895, between the City and the Company — being said contract No. 2 — was not, under the act of 1895, to be included in the valuation and award under the act; *nevertheless the City, by its counsel, suggested to the commissioners that that contract be valued by the commissioners, and accordingly it was so valued.*

The valuation did not, however, appear separately, but was included in the commissioners' final award. (Gl. R. 16.)

It is to be borne in mind that these commissioners did not value the similar contract in the Newburyport case.

The commissioners reported that they "followed the rule adopted by the Court in the Newburyport case," 168 Mass. 341.

In the same paragraph they showed that they departed from that rule as follows: —

> . . . "We have also, with the respondent's consent, valued at what we deemed it worth a contract subsisting Oct. 1, 1895, between the city and the company, to furnish the former with water for its hydrants, for a certain price until Sept. 28, 1896." (Gl. R. 12.)

We have shown above that such valuation was not merely with respondent's consent, but that the City claimed to the

commissioners that the contract was not to be included in the valuation and award, and nevertheless the City, by its counsel, suggested to the commissioners that the contract be valued by them, and accordingly it was so valued. (Gl. R. 16.) Admitted by the demurrer.

It thus appears, in effect, not only that the City claimed that, under the act of 1895 the contract could *not* be valued, but that the commissioners agreed with them, and yet the City was willing to part with its money and to stultify itself by suggesting to the commissioners that they value the contract; and this was done.

What was the City's object?

Obviously the City's representatives feared that the action of the statute upon this contract would be held to be *the enactment of a law by the state which impaired the obligation of plaintiff's contract.*

We submit, under the authorities herein, that this fear was justified.

Will the present court allow plaintiff's rights in reference to this contract, and flowing out of this contract, to be violated and rendered nugatory by the obvious artifice of the City and ~~the~~ its representatives, by which the City may be freed from responsibility for property worth hundreds of thousands of dollars by the strategem of procuring some unknown, but certainly small, valuation of this contract concealed in the general award?

We leave this question to be determined between the court and the defendant, only suggesting that, though the contract is included in the award, the bill contains the following allegation admitted by the demurrer: —

> "(*f*) That no decree or judgment has yet been entered upon the said award; and no payment thereunder has been made or tendered to plaintiff." (Gl. R. 18.)

The City cannot, therefore, be harmed if the present court deprive it of all expected benefit from such artifice.

We submit that plaintiff's assignments of error VII., VIII., XII., XIII., and XIV. (Gl. R. 115, 116) should also be sustained.

As to Further Anticipated Defences.

As to the Reserved Power of Massachusetts over Corporate Franchises.

If any attempt be made to defend under such reserved power, we beg to rely upon our corresponding point VIII. (*ante*, p. 211) in the Newburyport case, and our argument under the contract clause of the Constitution (*ante*, p. 196).

As to the Police Power.

As there was no "Merrimac River episode" in the Gloucester matter, and as we know of no possible ground of complaint which might come under the broadest suggestion of the police power, we do not anticipate that this line of defences will really be attempted in the Gloucester case.

If, however, it be offered, we beg to rely upon our corresponding point IX. in the Newburyport case, under the claim concerning the contract clause of the Constitution (*ante*, p. 221).

In Conclusion as to Both Cases.

Having shown the novel character of the statutes in question, and that their novelty was by a threat coupled with an unlawful exaction which compelled each of the water companies to sell its property upon terms upon which its property could not be constitutionally taken; having shown also the attempt to disguise such unconstitutional taking under the *form* of a voluntary sale; having shown that the present court has held that "The courts are not bound by mere forms, nor are they to be misled by mere pretences; [that] they are at liberty — indeed, are under a solemn duty to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority,"* — we beg to commend to the court the language of Mr. Justice BRADLEY, speaking for the court in —

Boyd v. *United States*, 116 U.S. 616, 635, —

and quoted and adopted by Mr. Justice BREWER in —

Monongahela Navigation Co. v. *United States*, 148 U.S. at page 325, as follows: —

> "'*Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon.* Their motto should be *Obsta principiis.*'"

*Mugler v. Kansas, 123 U.S. at page 661.

And as connecting the broad principles above enunciated with this recent novel attempt to parade under the *form* of the Fourteenth Amendment, while violating and betraying its *essence*, we beg, finally, to repeat the language of Mr. Justice JACKSON, as quoted and adopted by the court in —

Chicago &c. R.R. v. *Chicago*, 166 U.S. at pages 238, 239:

"In *Scott* v. *Toledo*, 36 Fed. Rep. 385, 395–396, the late Mr. Justice JACKSON, while Circuit judge, had occasion to consider this question. After full consideration that able judge said: 'Whatever may have been the power of the States on this subject prior to the adoption of the Fourteenth Amendment to the Constitution, it seems clear that, since that amendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the States cannot now lawfully appropriate private property for the public benefit or to public uses without compensation to the owner, and that *any attempt so to do*, whether done in pursuance of a constitutional provision or *legislative* enactment, whether done by the *Legislature* itself or *under delegated authority* by one *of the subordinate agencies of the State, and whether done directly by taking the property of one person and vesting it in another or the public, or indirectly through the forms of law*, by appropriating the property and requiring the owner thereof to compensate himself, or to refund to another the compensation to which he is entitled, would be wanting in that "due process of law" required by said amendment. The conclusion of the Court on this question is, that since the adoption of the Fourteenth Amendment, compensation for private property taken

> for public uses constitutes an essential element in "due process of law," and that *without such compensation the appropriation of private property to public uses*, NO MATTER UNDER WHAT FORM OF PROCEDURE IT IS TAKEN, *would violate the provisions of the Federal Constitution*.'"

We submit that the same principles which have led the court to look past the *form* of taxation, and find, *in substance and effect*, an unconstitutional taking;[1] which have led the court to look past the *form* of the police power in state statutes and find, — in substance, effect, and application, — that such statutes were, in effect, for other than police purposes, and were unconstitutional;[2] which have led the court to look past the *form* of statutes regulating railroad rates and find, *in their unreasonableness and injustice as applied*, an unconstitutional *taking* of private property;[3] which have led the court to look past the *form* of an act purporting to be a *general* act, and find that, in effect, it was intended to operate *only upon a single company*, and was therefore in violation of the equal protection of the laws secured by the Fourteenth Amendment;[4] that these same principles now justify the court in looking past the *form* of a voluntary sale provided by statute and finding therein, *in substance and effect*, LEGAL COMPULSION AND DURESS RESULTING IN DEPRIVING THE PLAINTIFFS HEREIN OF THEIR RESPECTIVE PROPERTIES,

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[1] *Loan Association* v. *Topeka*, 20 Wall, 655.

Fallbrook Irrigation District v. *Bradley*, 164 U.S. at page 155.

[2] *Chy Lung* v. *Freeman*, 92 U.S. 275, 279, 281.

[3] See cases cited *ante*, p. 66.

[4] *Cotting* v. *Kansas City Stock Yards Co. &c.*, 183 U.S. 79, 103, 112.

IN VIOLATION OF THE PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES, THE PROTECTION OF WHICH WE HAVE CLAIMED AND ARGUED, AND WHICH CAN BE SECURED TO US ONLY BY THE JUDGMENT OF THIS COURT.

ROBERT M. MORSE,
LAURISTON L. SCAIFE,
of Counsel for both Apellants.

APPENDIX.

[For Index to Appendix, see General Index, p. xxiii.]

MASSACHUSETTS STATUTES RELATING TO THE NEWBURYPORT WATER COMPANY AND THE CITY OF NEWBURYPORT.

EXHIBIT A. (R. 18.)

Acts and Resolves Passed by the General Court of Massachusetts in the Year 1880.

Page 184, chapter 235.

An act to incorporate the Newburyport Water Company.

Be it enacted, etc., as follows:

SECTION 1. Joseph B. Morss, William H. Huse, Edward F. Coffin, Edward P. Russell, Henry M. Cross and Lawrence B. Cushing, their associates and successors, are hereby made a corporation by the name of the Newburyport Water Company, for the purpose of furnishing the inhabitants of Newburyport with pure water for the extinguishment of fires, and for domestic and other purposes; with all the powers and privileges, and subject to all the duties, restrictions and liabilities set forth in all general laws which now are or hereafter may be in force, applicable to such corporations.

SECT. 2. Said corporation, for the purpose, aforesaid, may take and hold the water, or as much thereof as may be necessary, not exceeding one and a half million of gallons daily, of any springs, natural ponds or brooks within the limits of said city, or of Kimball's pond, in the towns of Amesbury and Merrimac, or any of the effluents from said pond, or from the Powow river, in said town of Amesbury and the town of Salisbury; and may convey said waters, or any part thereof, into and through said city and said towns of Amesbury and Salisbury; and may take and hold, by purchase or otherwise, any real estate necessary for the raising, preservation and purity of the same, or of forming dams or reservoirs to hold the same, and for lay-

ing and maintaining aqueducts and pipes for distributing the waters so taken and held in any and all parts of said city and towns of Amesbury and Salisbury; and may lay its water pipes through any private lands, with the right to enter upon the same and dig therein for the purpose of making all necessary repairs or service connections; and for the purposes aforesaid may carry its pipes under or over any water course, street, railroad, highway or other way, in such manner as not to obstruct the same; and may enter upon and dig any road or other way for the purpose of laying or repairing its aqueducts, pipes or other works; and in general may do other acts and things convenient or proper for carrying out the purposes of this act. In case either of the towns in which said Kimball's pond is situated should hereafter apply for authority to take water from the same, the powers hereby granted shall not be construed as creating any priority of right, or operate in the prejudice of such application.

SECT. 3. Said corporation may declare the quantity of water proposed to be taken under this act, not exceeding one and a half million of gallons daily, not less than three months before the waters shall be withdrawn from said springs, ponds or brooks; and within sixty days from the time it shall take any lands, springs, ponds or brooks for the purpose of this act, otherwise than by purchase, said corporation shall file in the registry of deeds for the southern district of the county of Essex a description of such lands, springs, ponds, brooks or water, sufficiently accurate for identification, and state the purposes for which it is so taken, and the title of any land so taken shall vest in said corporation; and upon such filing the terms shall be the measure and limit of the right of said corporation to take and divert the waters of such springs, ponds or brooks; but if no such notice is filed, said measure and limit shall be one and a half million of gallons daily. If at any time said corporation shall take a larger quantity of

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water than said limit it may be restrained by injunction from taking such larger quantity, in a suit in equity brought by any party interested.

SECT. 4. Any person or corporation injured in any way by any acts of said corporation under this act, and failing to agree with said corporation as to the amount of damages, may have the same assessed and determined in the manner provided when land is taken for highways; but no application shall be made to the county commissioners for the assessment of damages for the taking of water rights until the water is actually taken and diverted by said corporation. Any person whose water rights are thus taken or affected may apply as aforesaid within three years from the time the water is actually withdrawn or diverted, and not thereafterwards, and no suit for injury done under this act shall be brought after two years from the alleged date of the receipt of injury.

SECT. 5. If said corporation takes the water from Kimball's pond or any of its effluents, or from Powow river, it shall lay its aqueduct or main pipe for conducting the same to said city by some convenient route through the town of Amesbury. The inhabitants of any town upon the line of the works authorized by this act, upon the application of its board of selectmen, shall be entitled to the reasonable use of the water, for the same uses as are hereinbefore provided, upon paying an equitable compensation therefor, which in case of difference shall be determined by three commissioners, to be appointed by the supreme judicial court, upon application of either party and notice to the other, whose award when accepted by the court shall be binding upon the parties for the term of five years.

SECT. 6. Any town under whose roads, streets or ways said corporation lays its aqueducts or main pipe may require said corporation to insert therein proper hydrants, at points not less than five hundred feet apart, to be used for

extinguishing fires, and for no other purpose. The expense of erecting said hydrants and keeping the same in repair shall be paid by such town.

SECT. 7. If any person shall use any water taken under this act without the consent of said corporation, or shall wantonly or maliciously divert the water, or any part thereof, taken or held by said corporation pursuant to the provisions of this act, or corrupt the same or render it impure, or destroy or injure any dam, aqueduct, conduit, pipe, hydrant, machinery or other works or property held, owned or used by said corporation, under the authority of and for the purposes of this act, he shall forfeit and pay to said corporation three times the amount of damage assessed therefor, to be recovered in an action of tort; and on conviction of either of the wanton or malicious acts aforesaid may be also punished by fine not exceeding three hundred dollars, or by imprisonment in jail not exceeding one year.

SECT. 8. Said corporation may distribute the water through said city of Newburyport; may establish and fix rates and take rates for the use of said water and collect the same, and may make such contracts with the said City of Newburyport or with individuals or corporations to supply water for fire or for other purposes as may be agreed upon between said city or individuals or corporations, and said corporation: *provided* that the source of supply, the size and quality of the pipes to be used, shall be approved by the board of water commissioners to be appointed under the provisions of this act. The City of Newburyport is hereby authorized to contract for a supply of water for fire purposes for a term of years with said Newburyport Water Company: *provided*, the same is assented to by said city by a majority vote of the voters present and voting thereon at a legal meeting called for that purpose.

SECT. 9. Said corporation, for the purposes set forth in this act, may hold real and personal estate, and the

whole capital stock shall not exceed three hundred thousand dollars, to be divided into shares of one hundred dollars each.

SECT. 10. The City of Newburyport is hereby authorized to appoint a board of water commissioners, to consist of five citizens of said city, who shall be chosen by the city council by joint ballot of both branches, whose duties it shall be to investigate all questions relative to the introduction of pure water into said city; to ascertain the cost of the same, and to report the result of the investigation and deliberations upon the same to the city council, at least ten days prior to the time appointed by section twelve of this act for said city, to vote upon the acceptance of chapter two hundred and forty of the acts of the year eighteen hundred and seventy-eight. They shall serve without compensation, but the necessary expenses and liabilities incurred in the employment of engineers and personal examination of various systems of water supply shall be defrayed by said city; and the city council shall appropriate such sum or sums of money as may be needed for this purpose, and in the same manner as money is appropriated for other city purposes.

SECT. 11. The City of Newburyport shall have the right at any time after ten years from the date of the completion of said works to purchase the corporate property and all the rights and privileges of said company at a price which may be mutually agreed upon between said corporation and the said City of Newburyport; and the said corporation is authorized to make sale of the same to said city. In case said corporation and city are unable to agree, then the compensation to be paid shall be determined by three commissioners to be appointed by the supreme judicial court upon application of either party, and notice to the other, whose award when accepted by the court shall be binding upon both parties. And this authority to purchase said franchise and property is granted on condition that the

same is assented to by said city by a two-thirds vote of the voters present and voting thereon at a meeting called for that purpose.

SECT. 12. In case the City of Newburyport shall accept chapter two hundred and forty of the acts of the year eighteen hundred and seventy-eight, as revived and continued by chapter two hundred and forty of the acts of the year eighteen hundred and seventy-nine, within two months from the date of the passage of this act, and shall also within three months after so accepting the same vote to construct the works contemplated therein, and to raise and appropriate the necessary sum of money therefor, this act shall be inoperative; otherwise this act shall take effect at and upon the expiration of the said two months, and the said chapter two hundred and forty of the acts of the year eighteen hundred and seventy-eight, as revived by chapter two hundred and forty of the acts of the year eighteen hundred seventy-nine shall become void.

Approved April 23, 1880.

EXHIBIT B. (R. 22.)

Acts and Resolves of Massachusetts, 1878.

Chapter 240.

An act to supply the City of Newburyport with water.

Be it enacted, etc., as follows:

SECTION 1. The City of Newburyport is hereby authorized to supply itself and its inhabitants with pure water to extinguish fires, generate steam, and for domestic and other uses, and may establish public fountains and hydrants, and regulate their use, and may discontinue the same, and may collect such rents as may be fixed for the use of such water.

SECT. 2. Said city for the purposes aforesaid may take and hold the water, or so much thereof as may be necessary, not exceeding one and a half million of gallons daily,

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of any springs, natural ponds or brooks within the limits of said city, or of Kimball's pond in the towns of Amesbury and Merrimac, or any of the effluents from said pond; and may convey said waters or any part thereof into and through said city and said town of Amesbury and the town of Salisbury; and may also take and hold, by purchase or otherwise, all necessary lands for raising, holding, flowing, diverting, conducting and preserving such waters, and conveying the same to any and all parts of said city and of said towns of Amesbury and Salisbury; and may erect thereon proper dams, reservoirs, buildings, fixtures and other structures, and make excavations and embankments, and procure and run machinery therefor; and for such purposes may construct and lay down conduits, pipes and drains in, under or over any lands, watercourses, roads or railroads, and along any street, highway, or other way other than a railway, in such manner as not to unnecessarily obstruct the same; and for the purpose of constructing, laying down, maintaining and repairing such conduits, pipes and drains, and for all other purposes of this act, may dig up, raise and embank any such land, street, highway or other way, in such manner as to cause the least hindrance to travel thereon; and in general may do any other acts and things necessary or convenient and proper for carrying out the purposes of this act. In case either of the towns in which said Kimball's pond is situated should hereafter apply for authority to take water from the same, the powers hereby granted shall not be construed as creating any priority of right, or operate to the prejudice of such application.

SECT. 3. Said City of Newburyport may, by vote of its city council, declare the quantity of water proposed to be taken under this act, not exceeding one and a half million of gallons daily, such vote to be passed not less than six months before the waters shall be withdrawn from said springs, ponds or brooks; and within sixty days from the

time it shall take any lands, springs, ponds, brooks or water for the purposes of this act, otherwise than by purchase, said city shall file in the registry of deeds for the southern district of the county of Essex a description of such lands, springs, ponds, brooks or water, sufficiently accurate for identification, with a statement of the purposes for which the same are taken, together with a copy of such vote, if any has been passed, signed by the mayor of said city; and upon such filing, the terms of such vote shall be the measure and limit of the right of said city to take and divert the waters of such springs, ponds or brooks; but if no such vote is so passed and filed said measure and limit shall be one and a half million of gallons daily. If at any time said city shall take a larger quantity of water than said limit, it may be restrained by injunction from taking such larger quantity, in a suit in equity brought by any party interested.

SECT. 4. Said City of Newburyport shall be liable to pay all damages that shall be sustained by any person or persons in their property by the taking of said waters or any part thereof as authorized by this act, or by the taking of any land, rights of way, water rights or easements, or by the erection of any dams, or the construction of any aqueducts, reservoirs, water ways or other works for the purposes of this act; and if the owner or owners of any property which shall be taken as aforesaid, or other person or persons sustaining damages as aforesaid, shall not agree on the damages to be paid therefor, he or they may apply by petition for an assessment of the damages at any time within three years from the taking of the said property, or the construction of dams or other works occasioning damages as aforesaid, and not afterwards, to the superior court in the county in which the same are situated. Such petition may be filed in the clerk's office of said court, in vacation or in term time, and the clerk shall thereupon issue a summons to the said City of Newburyport, return-

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able, if issued in vacation, at the next term of the said court to be held after the expiration of fourteen days from the filing of said petition, and if in term time, returnable on such day as said court shall order, to appear and answer to the said petition; the said summons shall be served fourteen days at least before the term or day at which it is returnable, by leaving a copy thereof and of the said petition, certified by the officer who shall serve the same, with the clerk of said city; and the said court may, upon default or hearing of said city, appoint three disinterested persons, who shall, after reasonable notice to the parties, assess the damages, if any, which such petitioner may have sustained as aforesaid; and the award of the said persons so appointed, or a major part of them, being returned into and accepted by the said court, shall be final, and judgment shall be rendered and execution issued thereon for the prevailing party, with costs, unless one of said parties shall claim a trial by jury as hereinafter provided.

SECT. 5. If either of the parties mentioned in section four shall be dissatisfied with the amount of damage awarded as therein expressed, such party may, at the term at which such award was accepted, or the next term thereafter, claim in writing a trial in said court, and have a jury to hear and determine at the bar of said court all questions of fact relating to such damages, and to assess the amount thereof; and the verdict of said jury being accepted and recorded by the said court, shall be final and conclusive, and judgment shall be rendered and execution issued thereon, and costs shall be recovered by the said parties respectively in the same manner as is provided by law in regard to proceedings relating to the laying out of highways.

SECT. 6. If said city takes the water from Kimball's pond or any of its effluents, it shall lay its aqueduct or main pipe, for conducting the same to said city, by some convenient route through the town of Amesbury. The

inhabitants of any town upon the line of the works authorized by this act, upon the application of its board of selectmen, shall be entitled to the reasonable use of the water, for the same uses as are herein before provided, upon paying an equitable compensation therefor, which in case of difference shall be determined by three commissioners, to be appointed by the supreme judicial court upon application of either party, and notice to the other, whose award, when accepted by said court, shall be binding upon the parties for the term of five years.

SECT. 7. Any town under whose roads, streets or ways said city lays its aqueduct or main pipe may require said city to insert therein proper hydrants, at points not less than five hundred feet apart, to be used for the purpose of extinguishing fires, and for no other purpose. The expense of inserting said hydrants and keeping the same in repair shall be paid by such town.

SECT. 8. No application shall be made to the court for the assessment of damages for the taking of any water rights, or for any injury thereto, until the water is actually withdrawn or diverted by said city under the authority of this act.

SECT. 9. If any person shall use any water taken under this act without the consent of said city, or shall wantonly or maliciously divert the water, or any part thereof, taken or held by said city pursuant to the provisions of this act, or corrupt the same, or render it impure, or destroy or injure any dam, aqueduct, pipe, conduit, hydrant, machinery or other works or property held, owned or used by said City of Newburyport under the authority of and for the purposes of this act, he shall forfeit and pay the said city three times the amount of damage assessed therefor, to be recovered in an action of tort; and on conviction of either of the wanton or malicious acts aforesaid, may be also punished by fine not exceeding three hundred dollars, or by imprisonment in jail not exceeding one year.

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SECT. 10. For the purpose of paying all necessary expenses and liabilities incurred under the provisions of this act, said city shall have authority to issue coupon bonds to be denominated "Newburyport water bonds," to be signed by the treasurer of said city, to an amount not exceeding two hundred and fifty thousand dollars, payable at periods not exceeding thirty years from the date thereof, with interest payable semi-annually at a rate not exceeding six per centum per annum; and said city may sell said bonds at public or private sale, or pledge the same for money borrowed for the purposes of this act, upon such terms and conditions as it may deem proper. And the city council of said city is hereby authorized from time to time to appropriate, grant and assess such sum or sums of money as shall be deemed expedient, towards paying said expenses, or the principal of the money so borrowed or obtained, and the interest thereof, in the same manner as money is appropriated, granted and assessed for other city purposes.

SECT. 11. The rights, powers and authority granted to the city of Newburyport by this act shall be vested in and exercised by a board of water commissioners, consisting of three citizens of said city, who shall be chosen by the city council, by joint ballot of both branches. The said commissioners shall, during their continuance in office, execute, superintend and direct the performance of all the works, matters and things mentioned in the preceding sections which are not otherwise specifically provided for in this act; and shall be subject to such ordinances, rules and regulations, in the execution of their said trust, as the city council may from time to time ordain and establish, not inconsistent with the provisions of law. They shall serve for the period of three years from the time of their appointment, unless the construction of the works herein contemplated shall be sooner finished. Thereafter the rights, powers and authority granted to the said city by this act shall be vested in and exercised by a board of water

commissioners, consisting of three citizens of said city, who shall be chosen by the city council, by joint ballot of both branches, one for the term of one year from the first Monday of January in the year eighteen hundred and eighty-one, one for the term of two years, one for the term of three years, and annually thereafter one water commissioner shall be chosen to serve for the term of three years. Said commissioners shall receive such compensation as the city council of said city may prescribe, and a majority of said commissioners shall be a quorum for the exercise of the powers and duties prescribed by this act.

SECT. 12. The said water commissioners shall establish such prices or rents for the use of the water as to provide annually, if practicable, from the net income and receipts therefor, for the payment of the interest on said water bonds, and also, after three years from the introduction of the water into said city, for the further payment of not less than one per centum of the principal of said bonds. The net surplus income and receipts, after deducting all expenses, interest and charges of distribution, shall be set apart as a sinking fund, and applied solely to the payment of the principal of said bonds, until the same are fully paid and discharged. The "commissioners of sinking fund," as now established by ordinance of said city, shall be trustees of said fund, and shall annually, and as often as the city council may require, render an account of all their doings in relation thereto.

SECT. 13. The occupant of any tenement shall be liable for the payment of the rent for the use of the water in such tenement; and the owner thereof shall be also liable if, on being notified of such use, he does not object thereto.

SECT. 14. This act shall take effect upon its passage, and shall become void unless accepted by a vote of two thirds of the legal voters of the city of Newburyport, present and voting thereon, at a legal meeting which shall

be called in their several ward rooms for that purpose, by the mayor and aldermen of said city, within one year from the passage of this act, at which meeting the check list shall be used.

Approved May 11, 1878.

EXHIBIT C. (R. 26.)

Acts and Resolves of Massachusetts, 1879.

Chapter 240.

An act to revive "An act to supply the city of Newburyport with water."

Be it enacted, etc., as follows:

Chapter two hundred and forty of the Acts of the Year Eighteen hundred and seventy-eight, being "An act to supply the city of Newburyport with water," is hereby revived and continued for two years from the passage of this act.

Approved April 18, 1879.

EXHIBIT E. (R. 28.)

Acts and Resolves Passed by the General Court of Massachusetts in the Year 1893.

Chapter 471.

An act to supply the city of Newburyport with water.

Be it enacted, etc., as follows:

SECTION 1. The City of Newburyport may supply itself and its inhabitants with water for the extinguishment of fires and for domestic, manufacturing and other purposes, and may establish fountains and hydrants, relocate or discontinue the same; may regulate the use of such water and fix and collect rates to be paid for the use of the same.

SECT. 2. The said city, for the purposes aforesaid, may take, by purchase or otherwise, and hold the waters of

any pond, stream, spring or wells within the limits of said city not heretofore taken or purchased by the Newburyport Water Company, and the Artichoke river in West Newbury and Newburyport, and the water rights connected therewith; and obtain and take water by means of bored, driven, artesian or other wells on any lands within said city, and hold and convey said water through said city and through said town of West Newbury from said ponds and said river; and may also take and hold, by purchase or otherwise, all lands, rights of way and easements necessary for holding and preserving such water and for conveying the same to any part of said city of Newburyport; and may erect on the land thus taken or held proper dams, buildings, fixtures and other structures; and may make excavations, procure and operate machinery and provide such other means and appliances as may be necessary for the establishment and maintenance of complete and effective water works; and may construct and lay down conduits, pipes and other works: under or over any lands, water courses, railroads or public or private ways, and along any such way in such manner as not unnecessarily to obstruct the same; and for the purpose of constructing, maintaining and repairing such conduits, pipes and other works, and for all proper purposes of this act, said city may dig up any such lands, and, under the direction of the board of selectmen of the town in which any such ways are situated, may enter upon and dig up any such ways in such manner as to cause the least hindrance to public travel thereon.

SECT. 3. The city, shall within sixty days after the taking of any lands, rights of way, water rights, water sources or easements as aforesaid, otherwise than by purchase, file and cause to be recorded in the registry of deeds, for the county within which the same are situated, a description thereof sufficiently accurate for identification, with a state-

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ment of the purpose for which the same were taken, signed by the water commissioners hereinafter provided for.

SECT. 4. The city shall pay all damages sustained by any person or corporation in property by the taking of any land, right of way, water, water source, water right or easement, or by any other thing done by said city under the authority of this act. Any person or corporation sustaining damages as aforesaid under this act, who fails to agree with said city as to the amount of damages sustained, may have the damages assessed and determined in the manner provided by law when land is taken for the laying out of highways, on application at any time within the period of three years from the taking of such land or other property, or in the doing of other injury, under the authority of this act, but no such application shall be made after the expiration of said three years. No application for assessment of damages shall be made for the taking of any water, water right, or for any injury thereto, until the water is actually withdrawn or diverted by said city under authority of this act.

SECT. 5. The said city may, for the purpose of paying the necessary expenses and liabilities incurred under the provisions of this act, issue from time to time bonds, notes or scrip, to an amount not exceeding in the aggregate four hundred thousand dollars; such bonds, notes or scrip shall bear on their face the words, "Newburyport water loan;" shall be payable at the expiration of periods not exceeding thirty years from the date of issue; shall bear interest payable semi-annually at a rate not exceeding six per centum per annum, and shall be signed by the treasurer of the city and be countersigned by the water commissioners hereinafter provided for. The said city may sell such securities at public or private sale, or pledge the same for money borrowed for the purposes of this act, upon such terms and conditions as it may deem proper, *provided*, that such securities shall not be sold for less than the par value thereof.

The city shall provide, at the time of contracting said loan, for the establishment of a sinking fund, and shall annually contribute to such fund a sum sufficient with the accumulations thereof to pay the principal of said loan at maturity. The said sinking fund shall remain inviolate and pledged to the payment of said loan and shall be used for no other purpose.

SECT. 6. The said city instead of establishing a sinking fund may, at the time of authorizing said loan, provide for the payment thereof in such annual proportionate payments as will extinguish the same within the time prescribed in this act; and when such vote has been passed the amount required thereby shall, without further vote, be assessed by the assessors of said city in each year thereafter, until the debt incurred by said loan shall be extinguished in the same manner as other taxes are assessed, under the provisions of section thirty-four of chapter eleven of the public statutes.

SECT. 7. The return required by section ninety-one of chapter eleven of the public statutes shall state the amount of any sinking fund established under this act, and if none is established, whether action has been taken in accordance with the provisions of the preceding section, and the amounts raised and applied thereunder for the current year.

SECT. 8. The said city shall raise annually by taxation a sum which, with the income derived from the water rates, will be sufficient to pay the current annual expenses of operating its water works, and the interest as it accrues on the bonds, notes and scrip issued as aforesaid by said city, and to make such contributions to the sinking fund and payments on the principal as may be required under the provisions of this act.

SECT. 9. Whoever wilfully or wantonly corrupts, pollutes or diverts any of the waters taken or held under this act, or injures any structure, work or other property

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owned, held or used by said city under the authority and for the purposes of this act, shall forfeit and pay to said city three times the amount of damages assessed therefor, to be recovered in an action of tort; and upon conviction of either of the above wilful or wanton acts shall be punished by a fine not exceeding three hundred dollars, or by imprisonment not exceeding one year.

SECT. 10. The powers and duties granted to and imposed upon the City of Newburyport by this act shall be exercised by a board of water commissioners, consisting of five residents of the city, to be appointed by the mayor with the approval of the city council. Said commissioners shall be appointed and hold their office from the time of their appointment and approval, for the terms of one, two, three, four and five years, respectively, from the first Monday of May next following their appointment; and thereafter one commissioner shall be appointed each year for the term of five years from the first Monday of May. All such commissioners, except in a case of removal, shall hold office until their successors are appointed in their stead. Vacancies occurring during the term may be filled for the remainder of the term. No person shall be appointed commissioner who holds, at the time, any city office by popular election. Any commissioner, after due notice and hearing, may be removed at any time by a two-thirds vote of each branch of the city council, for any cause which shall be deemed sufficient, and shall be expressed in the vote of removal. The commissioners shall receive no compensation for their services unless the city council by a two-thirds vote of each branch thereof otherwise determine, and in such case the amount of compensation may be fixed by a like two-thirds vote.

SECT. 11. The water commissioners shall fix such prices or rents for the use of water as shall produce annually, as near as may be, a net surplus equal to two per centum of the total amount of the bonds, notes and scrip issued under

this act, after paying all current expenses of operating the water works and interest upon loans, and after the payment of all expenses for new construction not exceeding ten thousand dollars in any one year. The commissioners of sinking funds of the city of Newburyport shall be trustees of a sinking fund which shall be set apart for the payment and redemption of said water loan, and which shall remain invoiolate and pledged to the payment of said loan, and shall be used for no other purpose. The net surplus thereof shall be paid into the sinking fund, and if said surplus does not equal two per centum of the total amount of the bonds, notes and scrip issued under this act, the city shall raise by general taxation a sum which with the surplus shall equal said two per centum, and shall contribute said sum to the sinking fund. The commissioners shall annually, and as often as the city council may require, render an account of all their doings in relation to the sinking fund, and shall be governed by the provisions of section seven of chapter twenty-nine of the Public Statutes, except as herein otherwise provided.

SECT. 12. At any time within sixty days after the passage of this act, and not after sixty, the Newburyport Water Company may notify the mayor of Newburyport in writing that it desires to sell to said city its corporate property and all the rights and privileges of said company, and execute and deliver to said city proper deeds and instruments in writing, conveying to said city the property aforesaid: *provided, however*, the legal voters of the city of Newburyport, at legal meetings to be called in the several wards of said city within six months after said notification has been received as aforesaid, shall, by a majority vote of the voters of said city present and voting thereat at said meetings, vote to purchase the aforesaid property upon the terms and conditions contained in this section, whereupon the property thus conveyed shall become the property of the City of Newburyport, and

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said city shall be liable to pay to said company the fair value of the property thus conveyed; and in case the said city and the said company shall be unable to agree upon the value of said property, the supreme judicial court may, upon application of either party and notice to the other, appoint three commissioners, one of whom shall be a skilled engineer, and one learned in the law, who shall determine the fair value of said property conveyed as aforesaid, and whose award when accepted by the court shall be final.

SECT. 13. After the vote provided for in section twelve of this act, or provided the Newburyport Water Company does not so notify the said mayor within said sixty days, this act shall be submitted to the legal voters of the city of Newburyport for their acceptance or rejection, at legal meetings to be called in the several wards of said city within eight months from the passage of this act, and shall take effect from and after its acceptance by a two-thirds vote of the voters of said city present and voting thereon at such meetings. The vote shall be by separate ballot, and the ballot shall be Yes, or No, in answer to the question, "Shall the City of Newburyport accept chapter — of the Acts of eighteen hundred and ninety-three, authorizing the City of Newburyport to establish and maintain a system of water supply for domestic and other uses?" This act shall be void if not accepted by said vote.

Approved June 10, 1893.

EXHIBIT H. (R. 33.)

Acts and Resolves Passed by the General Court of Massachusetts for the Year 1894.

Chapter 474.

An act to provide for the purchase of the property of the Newburyport Water Company by the City of Newburyport.

Be it enacted, etc., as follows:

SECTION 1. If, within thirty days after the passage of this act, the Newburyport Water Company shall notify the mayor of the city of Newburyport, in writing, that it desires to sell to said city all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water, said city shall not proceed to supply water to itself or its inhabitants under the authority of chapter four hundred and seventy-one of the Acts of the year eighteen hundred and ninety-three, unless it shall have first purchased of said company the property aforesaid; and said company is authorized to make sale of said property to said city, and said city is authorized to purchase the same. Whenever said city shall, by a majority vote of the legal voters of said city present and voting thereon at a meeting called for that purpose, vote to purchase said property, notice of the desire of said company to sell the same having been given as hereinbefore provided, said company shall, within twenty days after the vote aforesaid, execute and deliver to said city proper deeds and instruments in writing, conveying to said city the property aforesaid, and said property thus conveyed shall thereupon become the property of said city, and said city shall pay to said company the fair value thereof, to be ascertained as hereinafter provided. If at the first meet-

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ing a majority of the voters present and voting do not vote to purchase said property, other meetings may be called and held therefor. In case the said city and the said company shall be unable to agree upon the value of said property, the supreme judicial court shall, upon application of either party and notice to the other, appoint three commissioners, two of whom shall be skilled engineers and the third learned in the law, who shall determine the fair value of said property for the purposes of its use by said city, and whose award, when accepted by the court, shall be final. Such value shall be estimated without enhancement on account of future earning capacity or good will, or on account of the franchise of said company.

SECT. 2. In case said Newburyport Water Company shall convey its property to the City of Newburyport, in accordance with the provisions of the preceding section, said city shall manage and use the property thus conveyed for the purposes and under the provisions of chapter four hundred and seventy-one of the Acts of the year eighteen hundred and ninety-three.

SECT. 3. The said city may, for the purpose of paying the necessary expenses and liabilities incurred under the provisions of this act, issue from time to time bonds, notes or scrip to an amount sufficient for such purpose; such bonds, notes or scrip shall bear on their face the words, "Newburyport water loan," shall be payable at the expiration of periods not exceeding thirty years from the date of issue, shall bear interest payable semi-annually at a rate not exceeding six per centum per annum, and shall be signed by the treasurer of the city and countersigned by the water commissioners provided for by chapter four hundred and seventy-one of the Acts of the year eighteen hundred and ninety-three. The said city may sell such securities at public or private sale, or pledge the same for money borrowed for the purposes of this act, upon such terms and

conditions as it may deem proper, provided that such securities shall not be sold for less than the par value thereof. The city shall provide at the time of contracting said loan for the establishment of a sinking fund, and shall annually contribute to such fund a sum sufficient with the accumulations thereof to pay the principal of such loan at maturity. The said sinking fund shall remain inviolate and pledged to the payment of said loan, and shall be used for no other purpose.

SECT. 4. In case said city shall, in violation of section one of this act, proceed to supply itself or its inhabitants with water before making the purchase aforesaid, the supreme judicial court shall, upon petition of said company, have jurisdiction in equity to enjoin said city from so doing until it shall have made such purchase.

SECT. 5. This act shall take effect upon its passage.

Approved June 14, 1894.

MASSACHUSETTS STATUTES RELATING TO THE GLOUCESTER WATER SUPPLY COMPANY AND THE CITY OF GLOUCESTER.

EXHIBIT A. (Gl. R. 19.)

Acts and Resolves of Massachusetts, 1881, Chap. 167.

An act to incorporate the Gloucester Water Supply Company.

Be it enacted, etc., as follows:

SECTION 1. Joseph O. Proctor, Robert R. Fears, Samuel A. Stacy, Robert A. Tibbets, Nehemiah D. Cunningham, their associates and successors, are hereby made a corporation by the name of the Gloucester Water Supply Company, for the purpose of furnishing the inhabitants of Gloucester with pure water for the extinguishment of fires, and for domestic, mechanical and other purposes; with all the powers and privileges, and subject to all the duties, restrictions and liabilities set forth in all general laws

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which now are or hereafter may be in force, applicable to such corporations.

SECTION 2. Said corporation may for the purposes aforesaid take, hold and convey through the city of Gloucester, or any part thereof, the water of any springs, natural ponds, brooks or other water sources in ward eight of said city, and may take and hold by purchase or otherwise any real estate necessary for the preservation and purity of the same, or for forming any dams or reservoirs to hold the same, and for laying and maintaining aqueducts and pipes for distributing the water so taken and held; and may lay its water pipes through any private lands, with the right to enter upon the same and dig therein for the purpose of making all necessary repairs or service connections; and for the purposes aforesaid may carry its pipes under or over any water course, street, railroad, highway or other way, in such manner as not unnecessarily to obstruct the same; and may, under the direction of the city authorities of Gloucester, enter upon and dig up any road or other way for the purpose of laying or repairing its aqueducts, pipes or other works; and in general may do any other acts and things convenient and proper for carrying out the purposes of this act.

SECTION 3. Said corporation shall, within sixty days after the taking of any land or water rights under the provisions of this act, otherwise than by purchase, file in the registry of deeds for the southern district of the county of Essex a description of any land so taken, sufficiently accurate for identification with a statement of the purposes for which it is so taken, and the title of the land so taken shall vest in said corporation. Any person or corporation injured in property by any acts of said corporation, and failing to agree with said corporation as to the amount of damages, may have the same assessed and determined in the manner provided when land is taken for highways; but no application shall be made to the county commissioners

for the assessment of damages for the taking of water rights until the water is actually taken and diverted by said corporation. Any person whose water rights are thus taken or affected may apply as aforesaid within three years from the time the water is actually withdrawn or diverted, and not thereafter; and no suit for injury done under this act shall be brought after three years from the date of the alleged receipt of injury.

SECTION 4. Said corporation may distribute the water through said city of Gloucester, may establish and fix from time to time rates for the use of said water, and collect the same, and make such contracts with the said City of Gloucester, or with individuals, or corporations, to supply water for fire or for other purposes, as may be agreed upon by said city, or individuals, or corporations, and said corporation. The City of Gloucester, by a majority vote of its city council present and voting jointly thereon, is hereby authorized to contract for a supply of water for fire or other purposes, for a term of years with said Gloucester Water Supply Company; *provided*, the contract is assented to by said city by a majority vote of the voters present and voting thereon at meetings called for that purpose in the several wards of said city.

SECTION 5. The capital stock of said corporation shall not exceed three hundred and fifty thousand dollars and shall be divided into shares of one hundred dollars each; and said corporation may at any time issue bonds to an amount equal to the capital stock actually paid in.

SECTION 6. If any person shall use any of said water taken under this act without the consent of said corporation, or shall wantonly or maliciously divert the water or any part thereof so taken, or corrupt the same, or render it impure, or destroy or injure any dam or aqueduct, pipe, conduit, hydrant, machinery, or other works or property held, owned or used by said corporation, under the authority of and for the purposes of this act, he shall forfeit and

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pay to said corporation three times the amount of damages assessed therefor, to be recovered in an action of tort; and on conviction of either of the wanton or malicious acts aforesaid may be punished by fine not exceeding three hundred dollars, or by imprisonment in jail not exceeding one year.

SECTION 7. The City of Gloucester shall have the right, at any time during the continuance of the charter hereby granted, to purchase the corporate property and all the rights and privileges of said company, at a price which may be mutually agreed upon between said corporation and the said City of Gloucester; and the said corporation is authorized to make sale of the same to said city. In case said corporation and said city are unable to agree, then the compensation to be paid shall be determined by three commissioners, to be appointed by the supreme judicial court upon application of either party and notice to the other, whose award, when accepted by the court, shall be binding upon both parties. And this authority to purchase said franchise and property is granted on condition that the same is assented to by said city by a two-thirds vote of the voters present and voting thereon at meetings called for that purpose in the several wards of said city.

SECTION 8. For the purposes of defraying the cost of such property, lands, water and water rights as shall be purchased for the purposes aforesaid, the City of Gloucester through its treasurer may from time to time issue notes, bonds, scrip or certificates of debt, to be denominated on the face thereof Gloucester water loan, to any amount not exceeding the amount paid by the city for said purchase, and bearing interest at a rate not exceeding six per centum per annum payable semi-annually, and the principal being payable at periods of not more than thirty years from the issue of said notes, bonds, scrip or certificates of debt, respectively. Said treasurer, under the authority of the city council, may sell such notes, bonds, scrip or

certificates of debt, or any part thereof, from time to time, or pledge the same for any money borrowed for the purposes aforesaid, on such terms and conditions as may be prescribed by the city council, or, in case the city council prescribe no terms and conditions, on such terms and conditions as he may deem proper; and said city shall annually raise by taxation an amount sufficient together with the net income received from rents for the use of said water, to pay the interest on said loans as it accrues; and shall establish at the time of contracting said debt a sinking fund, and contribute thereto from year to year an amount raised by taxation, not exceeding ten thousand dollars in any one year, sufficient with its accumulations to extinguish the debt at maturity; and said sinking fund shall remain inviolate and pledged to the payment of said debt and shall be used for no other purpose.

SECTION 9. In case the City of Gloucester shall purchase the property, rights, privileges and franchises of the corporation established by this act, the said city shall exercise all the rights, powers and authority and be subject to all the restrictions, duties and liabilities herein contained, in such manner and by such officers, servants or agents as said city may direct, and the said city shall be liable to damages for land, water or water rights taken for the purposes set forth in this act which shall not have been previously paid by said corporation.

SECTION 10. This act shall be null and void unless within three years from its passage said corporation shall avail itself of its provisions, and commence a prosecution of the work herein authorized.

SECTION 11. The owners of lands and water rights taken under this act, upon application by either party for an estimate of damages, may require said corporation to give security, satisfactory to the board of aldermen of said city for the payment of all damages and costs which may be awarded to them for the land or other property taken.

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And if, upon petition of the owner, with notice to the adverse party, the security appears to the aldermen of said city to have become insufficient, they shall require said corporation to give further security to their satisfaction; and all the right or authority of the corporation to enter upon or use said land and other property, except for making surveys, shall be suspended until it gives the security required.

SECTION 12. This act shall take effect upon its passage. *Approved March* 31, 1881.

EXHIBIT B. (Gl. R. 22.)

Acts and Resolves of Massachusetts, 1880, Chap. 203.

An act to supply the city of Gloucester with pure water.

Be it enacted, &c., as follows:

SECTION 1. The City of Gloucester is hereby authorized to take, hold and convey into and through said city or any part thereof, the waters of any springs, natural ponds, brooks or other water sources within its own limits, for the use of said city and the inhabitants thereof, for the extinguishment of fires, creating steam, domestic and other purposes; and may also take and hold, by purchase or otherwise, lands, or estates for the construction of such works as may be necessary therefor; and for laying and maintaining aqueducts or pipes, constructing and maintaining reservoirs or canals, and such other works as may be deemed necessary or proper for conveying, raising, forcing, retaining, distributing or disposing of said water.

SECTION 2. The mayor of said city of Gloucester shall, within sixty days after taking any of the land aforesaid, file in the registry of deeds for the county of Essex, southern district, a description thereof sufficiently accurate for identification.

SECTION 3. Said city for the purposes aforesaid may build aqueducts and maintain the same by any works

suitable therefor; may provide and maintain suitable machinery for raising the water above the source of supply; may erect such structures as are necessary for preserving the works; may make and maintain suitable dams and reservoirs, and establish such public fountains and hydrants as are at any time deemed proper, and may change or discontinue the same; may distribute the water throughout said city, regulate its use and establish the rates to be paid therefor. Said city may also for the purposes aforesaid carry its pipes and other works over or under any water course, street, railroad or highway, in such manner as not to obstruct the same; and may do any other acts and things necessary and proper in executing the purposes of this act.

SECTION 4. Said city shall be liable to pay all damages sustained by any person or corporation by taking any land, water, water rights, or property, or by the constructing of any aqueduct, reservoir, or other works for the purposes aforesaid; and if any person or corporation sustaining damages as aforesaid cannot agree with the city upon the amount of said damages, he or it may have them assessed in the same manner as is provided by law with respect to land taken for highways.

SECTION 5. For the purpose of defraying the expenses which may be incurred by the city of Gloucester in carrying into effect the powers granted by this act, the city council shall have authority to issue from time to time, notes, scrip, bonds or certificates of debt, to be denominated on the face thereof "City of Gloucester water loan," to an amount not exceeding three hundred thousand dollars; the same to bear interest not exceeding the rate of six per cent. per annum, and the principal to be payable at periods not more than thirty years from the issuing of said notes, scrip, bonds or certificates of debt respectively; and the city council may sell the same or any part thereof, from time to time, at public auction or private sale, or

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pledge the same for money borrowed for the purposes of this act, on such terms and conditions as the city council shall judge proper. The net surplus income and receipts shall be set apart as a sinking fund and applied solely to the payment of the principal of said loan. The mayor, city treasurer and president of the common council for the time being, shall be trustees of said fund, and shall whenever required by the city council render an account of all their doings in relation thereto. And the city council of said city is hereby authorized, from time to time, to appropriate, grant and assess such sum or sums of money as shall be deemed expedient toward paying the principal of the money so borrowed or obtained, and the interest thereof, in the same manner as money is appropriated, granted and assessed for other city purposes.

SECTION 6. The rights, powers and privileges hereby granted may be exercised by such officers, agents and servants as said city may select or employ, who shall be subject to such ordinances, rules and regulations as the city council may establish, and the mayor shall be eligible to such office.

SECTION 7. If any person shall use any of the said water without the consent of said city, or shall wantonly or maliciously divert the water or any part thereof, of the ponds, springs, streams or sources of water taken or held by said city, pursuant to the provisions of this act, or corrupt the same; or render it impure, or destroy or injure any dam, aqueduct, pipe, conduit, hydrant, machinery or other works or property held, owned or used by said city under the authority and for the purposes of this act, he shall forfeit and pay to said city three times the amount of damages assessed therefor, to be recovered in an action of tort; and on conviction of either of the wanton or malicious acts aforesaid may also be punished by fine not exceeding three hundred dollars, or by imprisonment in jail not exceeding one year.

SECTION 8. This act shall take effect upon its passage, and shall become void unless accepted by two-thirds of the legal voters of the city of Gloucester, present and voting thereon, at a legal meeting which shall be called in their several ward rooms for that purpose by the mayor and aldermen of said city, within six months from the passage of this act, at which meeting the check list shall be used.

Approved April 17, 1880.

EXHIBIT D. (Gl. R. 27.)

Acts and Resolves of Massachusetts, 1887, Chapter 288.

An act to amend the charter of the Gloucester Water Supply Company.

Be it enacted, etc., as follows:

SECTION 1. Section four of chapter one hundred and sixty-seven of the Acts of the Year Eighteen hundred and eighty-one is hereby amended by adding at the end of said section the following words: — or at any regular municipal election; and the warrant for notifying such meetings if called specially as aforesaid shall specify when the polls shall be opened for the purpose of voting and when they shall be closed.

SECTION 2. This act shall take effect upon its passage.

Approved May 19, 1887.

EXHIBIT K. (Gl. R. 48. Erroneously indexed in the Record, p. 40.)

Acts and Resolves of Massachusetts, 1895, Chap. 451.

An act to supply the city of Gloucester with water.

Be it enacted, etc., as follows. —

SECTION 1. The City of Gloucester may supply itself and its inhabitants with water for the extinguishment of fires and for domestic, manufacturing and other purposes; and may establish fountains and hydrants, relocate or dis-

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continue the same, may regulate the use of such water and fix and collect rates to be paid for the use of the same.

SECTION 2. Said city, for the purposes aforesaid, may take, by purchase or otherwise, and hold the waters of any pond, stream, spring or wells not heretofore taken or purchased by the Gloucester Water Supply Company, within the limits of said city, also the Chebacco lakes in the towns of Essex, Wenham and Hamilton, and the waters which flow into the same and the water rights connected therewith, and may obtain and take water by means of bored, driven, artesian or other wells, on any land within said city, and hold and convey said water through said city and through said towns of Essex, Wenham and Hamilton, from said lakes, and may also take and hold, by purchase or otherwise, all lands, rights of way and easements necessary for holding, storing, purifying and preserving such water and for conveying the same to any part of said city of Gloucester; and may erect on the lands thus taken or held, proper dams, reservoirs, buildings, fixtures and other structures, and may make excavations, procure and operate machinery, and provide such other means and appliances as may be necessary for the establishment and maintenance of complete and effective water works, and may construct and lay down conduits, pipes and other works, under or over any lands, water courses, railroads or public or private ways, and along any such way in such manner as not unnecessarily to obstruct the same; and for the purpose of constructing, maintaining and repairing such conduits, pipes and other works and for all proper purposes of this act, said city may dig up any such lands, and, under the direction of the board of selectmen of the town in which said ways are situated, may enter upon and dig up any such ways in such manner as to cause the least hindrance to public travel thereon. The title to all land taken or purchased under the provisions of this act shall vest in said city, and the land so taken may be managed,

improved and controlled by the board of water commissioners hereinafter provided for, in such manner as they shall deem for the best interests of said city.

SECTION 3. Said city shall, within ninety days after the taking of any lands, rights of way, water rights, water sources or easements as aforesaid, otherwise than by purchase, file and cause to be recorded in the registry of deeds for the southern district for the county of Essex a description thereof sufficiently accurate for identification, with a statement of the purpose for which the same were taken, signed by the water commissioners hereinafter provided for.

SECTION 4. Said city shall pay all damages sustained by any person or corporation in property by the taking of any lands, right of way, water, water sources, water rights or easements, or by any other thing done by said city under the authority of this act. Any person or corporation sustaining damages as aforesaid under this act, who fails to agree with said city as to the amount of damages sustained, may have the damages assessed and determined in the manner provided by law when land is taken for the laying out of highways, on making application at any time within the period of two years from the taking of such land or other property or the doing of other injury under the authority of this act; but no such application shall be made after the expiration of said two years. No application for the assessment of damages shall be made for the taking of any water, water right or for any injury thereto until the water is actually withdrawn or diverted by said city under the authority of this act. Said city shall pay all damages sustained under the authority of this act by the town of Essex in its alewife fishery, which, unless agreed upon, shall be assessed and determined in the manner hereinbefore provided; *provided, however*, that said city may construct and maintain suitable fishways for the preservation of said alewife fishery, said fishways to be constructed

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to the satisfaction of and to be approved by the commissioners on inland fisheries and game.

SECTION 5. In every case of a petition to the superior court for an assessment of damages the city may tender to the complainant or his attorney any sum, or may bring the same into court to be paid to the complainant for the damages by him sustained or claimed in his petition, or may in writing offer to be defaulted and that damages may be awarded against it for the sum therein expressed, and if the complainant does not accept such sum, with his costs up to that time, but proceeds in his suit, and does not recover greater damages than were so offered or tendered, not including interest on the sum recovered in damages from the date of such offer or tender, the city shall have judgment for its costs after said date, for which execution shall issue; and the complainant, if he recovers damages, shall be allowed his costs only to the date of such offer or tender.

SECTION 6. Said city may, for the purpose of paying the necessary expenses and liabilities incurred under the provisions of this act, issue from time to time bonds, notes or scrip, to an amount sufficient for such purpose, to be determined by the board of water commissioners hereinafter provided for. Such bonds, notes or scrip shall bear on their face the words, City of Gloucester water loan, and shall be payable at the expiration of periods not exceeding thirty years from the date of issue, shall bear interest, payable semi-annually, at a rate not exceeding six per cent. per annum, and shall be signed by the treasurer of the city and be countersigned by the water commissioners hereinafter provided for. Said city may sell such securities at public or private sale, or pledge the same for money borrowed for the purpose of this act, and upon such terms and conditions as it may deem proper; *provided*, that such securities shall not be sold for less than the par value thereof. Said city shall provide at the time of con-

tracting said loan for the establishment of a sinking fund and shall annually contribute to such fund a sum sufficient with the accumulations thereof to pay the principal of such loan at maturity. Said sinking fund shall remain inviolate and pledged to the payment of said loan, and shall be used for no other purpose.

SECTION 7. Said city instead of establishing a sinking fund may, at the time of authorizing said loan, provide for the payment thereof in such annual proportionate payments as will extinguish the same within the time prescribed in this act; and when such vote has been passed the amount required thereby shall without further vote be assessed by the assessors of said city in each year thereafter until the debt incurred by said loan shall be extinguished, in the same manner as other taxes are assessed under the provisions of section thirty-four of chapter eleven of the Public Statutes.

SECTION 8. The return required by section ninety-one of chapter eleven of the Public Statutes shall state the amount of any sinking fund established under this act, and if none is established whether action has been taken in accordance with the provisions of the preceding section, and the amounts raised and applied thereunder for the current year.

SECTION 9. Said city shall raise annually by taxation a sum which, with the income derived from water rates, will be sufficient to pay the current annual expenses of operating its water works and the interest as it accrues on the notes, bonds and scrip issued as aforesaid by said city, and such contributions to the sinking fund and payments on the principal as may be required under the provisions of this act.

SECTION 10. Whoever uses any water taken under this act without the consent of said city, or wilfully or wantonly corrupts, pollutes or diverts any of the waters taken or held by said city pursuant to the provisions of this act, or

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destroys or injures any structure, work or other property owned, held or used by said city under the authority and for the purposes of this act, shall forfeit and pay to said city three times the amount of damages assessed therefor, to be recovered in an action of tort; and upon conviction of either of the above wilful or wanton acts shall also be punished by a fine not exceeding three hundred dollars or by imprisonment not exceeding one year.

SECTION 11. The occupant of any tenement shall be liable for the payment of the rent for the use of water in such tenement, and the owner shall also be liable, in case of non-payment by the occupant, for all sums due for the use of water under this act, to be collected in an action of contract in the name of the City of Gloucester.

SECTION 12. The powers and duties granted and imposed upon the City of Gloucester by this act, including the purchase or taking of any lands or other property or rights, shall be exercised by a board of water commissioners, consisting of three residents of the city, to be appointed by the mayor, with the approval of the city council. Said commissioners shall be appointed and hold their office from the time of their appointment and approval for the terms of one, two and three years, respectively, from the first Monday of February next following their appointment, and thereafter one commissioner shall be appointed each year for the term of three years from the first Monday in February; all such commissioners, except in case of removal, shall hold office until their successors are appointed in their stead; vacancies occurring during the term may be filled for the remainder of the term. No person shall be appointed commissioner who holds at the time any city office by popular election. Any commissioner, after due notice and hearing, may be removed at any time by a two thirds vote of each branch of the city council for any cause which shall be deemed sufficient and shall be expressed in the vote of removal. The commissioners shall receive

such compensation for their services as the city council, by a two thirds vote of each branch thereof, shall determine.

SECTION 13. Said commissioners shall superintend and direct the construction, execution and performance of all the works, matters and things mentioned in the preceding sections; they shall be subject to such ordinances, rules and regulations in the execution of such duties as the city council may from time to time ordain and establish, not inconsistent with the provisions of this act and the laws of this Commonwealth. Said water commissioners shall make all contracts for the above purpose in the name and behalf of the city, but no contracts shall be made by them which involve the expenditure of money not already appropriated for the purpose by the city council. A majority of said commissioners shall be a quorum for the exercise of the powers and the performance of the duties of the commission.

SECTION 14. Said commissioners shall fix such prices or rents for the use of water as shall produce annually as near as may be a net surplus over operating expenses and interest charges equal to two per cent. of the total amount of the bonds, notes or scrip issued under this act, after paying all current expenses of operating the water works and interest upon loans, and after payment of all expense for new construction, not exceeding ten thousand dollars in any one year after the original construction. The commissioners of sinking funds of the city of Gloucester shall be trustees of the sinking fund which shall be set apart for the payment and redemption of said water loan, and which shall remain inviolate and pledged to the payment of said loan and shall be used for no other purpose. The net surplus aforesaid shall be paid into the sinking fund, if any is established hereunder, and if said surplus does not equal two per cent. of the total amount of the bonds, notes and scrip issued under this act, the city shall raise by general

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taxation a sum which, with the surplus, will equal said two per cent., and shall contribute said sum to the sinking fund. Said commissioners shall annually, and as often as the city council may require, render an account of all their doings in relation to the sinking fund, and shall be governed by the provisions of section eleven of chapter twenty-nine of the Public Statutes, except as herein otherwise provided.

SECTION 15. The town of Essex may connect water pipes with the main pipe of the city of Gloucester in said town, such connection to be made to the satisfaction of the engineer of said city, and in such case said city shall furnish to the inhabitants of said town through the pipes so connected a supply of water for the extinguishment of fires and for domestic and other purposes, for which the town of Essex shall pay to said city an equitable compensation. Said compensation in case of disagreement, shall be determined by three commissioners to be appointed by the supreme judicial court, upon application of either party and notice to the other, and the award of said commissioners, when accepted by said court, shall be binding upon the parties for the term of five years. Nothing in this act shall be construed to prevent the towns of Essex, Wenham, and Hamilton from supplying themselves with water from the Chebacco lakes for the extinguishment of fires and for domestic and other purposes, or to prevent the town of Manchester from so supplying itself from Gravel pond, so-called.

SECTION 16. If within thirty days after this act shall have been accepted by the City of Gloucester, as hereinafter provided, the Gloucester Water Supply Company shall notify the mayor of the city of Gloucester in writing that it desires to sell to said city all the corporate property and all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools and all appliances

owned by said company, and used in supplying said city and the inhabitants thereof with water, and shall file with the city clerk of said city a specification and description thereof, said city shall not proceed to supply water to itself or its inhabitants under the authority of this act, unless it shall have first purchased of said company the property aforesaid; and said company is authorized to make sale of said property to said city, and said city is authorized to purchase the same and manage and use the property thus conveyed for the purposes and under the provisions of this act. Whenever, within one year from the passage of this act, said city shall by a majority vote of the legal voters of said city, present and voting thereon at a legal meeting called for that purpose by order of the city council, or at any regular municipal election, vote to purchase said property, notice of the desire of said company to sell the same having been given as hereinbefore provided, said property shall thereupon become the property of said city, and said city shall pay to said company the fair value thereof, to be ascertained as hereinafter provided. In case said city and said company, after conference thereon, shall be unable to agree upon the value of said property, the supreme judicial court shall, upon application of either party and notice to the other, appoint three commissioners, who shall determine the fair value of said property, and whose award, when accepted by the court, shall be final. Such value shall be estimated without enhancement on account of future earning capacity, or future good will, or on account of the franchise of said company.

SECTION 17. This act shall be submitted to the qualified voters of the city of Gloucester for its acceptance and shall be void unless such voters, voting in their respective wards and precincts at a legal meeting called for that purpose by order of the city council, in the same manner as meetings for municipal elections are called, or at any regular municipal election, shall, within one year from the passage of

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this act, determine by ballot by a majority vote of those present and voting thereon to accept the same. The warrant for notifying such meeting, if called specially as aforesaid, shall specify when the polls shall be opened for the purpose of voting and when they shall be closed.

SECTION 18. So much of this act as authorizes the submission of the question of its acceptance to the legal voters of said city shall take effect upon its passage, but it shall not take further effect unless and until accepted as hereinbefore provided, by the qualified voters of said city; and the number of meetings called for the purpose of voting upon the question of its acceptance shall not exceed three in any one year.

Approved June 4, 1895.

MASSACHUSETTS STATUTES INVOLVED IN THE GREENWOOD CASE.

Greenwood v. *Freight Co.*, 105 U.S. 13.

Chapter 342 of the Acts of 1872 is as follows: —

An act to incorporate the Union Freight Railroad Company.

Be it enacted, etc., as follows:

SECTION 1. George B. Upton, Percival L. Everett, Henry S. Russell, their associates and successors, are hereby made a corporation by the name of the Union Freight Railroad Company, for the purpose of locating, constructing, maintaining and operating a railroad, for public use in the conveyance of freight only, with convenient single or double tracks, between the terminal points of the several steam railroads entering the city of Boston, and extending in and through such portions of the following streets as may be necessary for that purpose, namely: Lowell, Brighton, Causeway, Minot, Nashua, Commercial, Prince, Hanover, Fleet, India, Broad, Atlantic Ave-

nue, Federal, Kneeland, Cove, Lincoln and Eliot streets, and upon and over such other streets as the board of aldermen of said city may from time to time determine, on the petition of the said corporation; with the right also to construct, use and maintain side tracks from its main tracks to any wharf or wharves or warehouses, when requested, in writing, so to do by a majority in interest of the owners or occupants of such wharves or warehouses: *provided, however*, that no side track shall be laid upon a public street to any wharf or warehouse without the approval of the board of aldermen; and *provided, also*, that the rails for said tracks shall be of such pattern, suitable for railway freight cars in common use, as the board of aldermen may prescribe. Said corporation shall have all the powers and privileges and be subject to all the duties, restrictions and liabilities set forth in all general laws which now are or hereafter may be in force relating to street railway corporations, and to other railroad corporations, so far as the same may be applicable.

SECTION 2. Every railroad corporation by whose road said Union Freight Railroad passes, may, in the manner prescribed by said board of aldermen, connect its tracks with the same for the transportation of freight; and every such railroad corporation is empowered to make such connections, and in making such connections said railroad corporations shall have all the powers and be subject to all the liabilities set forth in the sixty-third chapter of the General Statutes and in the laws supplemental thereto; and it shall be the duty of said Union Freight Railroad Company to receive and deliver freight cars at each of said connections, and to haul the same over its road at its established rates. The cars on said road may be drawn during the night by steam power, subject to the regulation of said board of aldermen.

SECTION 3. Said corporation shall have the power to fix and collect such tolls for the transportation of freight

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as they may from time to time deem expedient: *provided*, that said rates shall only be sufficient to pay the reasonable and necessary expenses of said corporation, and to pay a dividend of five per centum semi-annually upon the actual cost of the construction and equipment of its road.

SECTION 4. Said corporation may, within its authorized limits, and for the purposes of this act, enter upon and use any part of the tracks of any other street railroad, and may suitably strengthen and improve such tracks; and if the corporations cannot agree upon the manner and conditions of such entry and use, or the compensation to be paid therefor, the same shall be determined in accordance with the provisions of the thirty-eighth section of chapter three hundred and eighty-one of the acts of the year eighteen hundred and seventy-one.

SECTION 5. The capital stock of said corporation shall not exceed the sum of five hundred thousand dollars.

SECTION 6. Said corporation shall within four months from the passage of this act, take the tracks, or any part thereof, of the Marginal Freight Railway Company, subject to the laws relating to the taking of land by railroad companies and the compensation to be made therefor.

SECTION 7. Chapter one hundred and seventy of the acts of the year eighteen hundred and sixty-seven, entitled an act to incorporate the Marginal Freight Railway Company, and so much of chapter four hundred and sixty-one of the acts of the year eighteen hundred and sixty-nine, as relates to said Marginal Freight Railway Company, are hereby repealed.

SECTION 8. The corporate powers conferred by this act shall cease, unless within one year from the date of its passage the Union Freight Railroad Company shall have constructed a track or tracks, in suitable condition for use, in accordance with the terms of this act, connecting one or more of the steam railroads on the northerly side of the city of Boston with one or more of the steam railroads on

the southerly side of said city: *provided, however*, that the board of railroad commissioners may at their discretion extend the time herein allowed for building the road for a further period not exceeding one year, on sufficient cause shown.

SECTION 9. The provisions of this act, and the franchise, rights, powers, privileges, duties and liabilities of the corporation established under this act may be altered, amended or repealed, and the legislature may annul or dissolve said corporation.

SECTION 10. This act shall take effect upon its passage.

Approved May 6, 1872.

[This is cited in 105 U.S. at page 14, as the Act of May 6, 1872.]

Acts and Resolves of Mass. 1867, c. 170:

An act to incorporate the Marginal Freight Railway Company.

Be it enacted, etc., as follows:

SECTION 1. Thomas Russell, Edward Crane, Harvey Scudder, their associates and successors, are hereby made a corporation under the name of the Marginal Freight Railway Company; with all the privileges and subject to all the duties, restrictions and liabilities set forth in the general laws which now are or may hereafter be in force relating to street railway corporations so far as they may be applicable.

SECTION 2. Said corporation, in such manner as may be prescribed and directed by the board of aldermen of the city of Boston, may construct, maintain and use a street railway with suitable turn-outs and with such tracks, not less than two, as the said board of aldermen may from time to time permit; the rails for said tracks to be of such pattern as the board of aldermen may prescribe, and which shall also be suitable for railway freight cars in common

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use, commencing at the Boston and Worcester Railroad tracks in Lincoln or South Street in said Boston, thence through, upon and over Lincoln or South and Beach Streets to Federal Street, or through, upon and over Lincoln, Tufts and East Streets to Federal Street; and also commencing on the freight tracks of the Old Colony and Newport Railway Company near its freight depot in said Boston, thence over, through and upon Cove and Beach Streets to Federal Street, or through, upon and over Cove and East Streets to Federal Street; thence through, upon and over Federal Street and Broad Street to Rowe's Wharf; thence through all intervening estates, at the head of Rowe's Wharf and India Wharf to India Street; thence through, upon and over India Street and through the westerly end of Central Wharf block and through, upon and over the street east of the custom-house to Commercial Street; thence through, upon and over Commercial, Causeway and Lowell Streets, or through, upon and over Commercial, Causeway, Andover, and Minot Streets to a connection with the freight tracks of the Boston and Lowell Railroad Company; with the right also to construct, use and maintain side tracks from said line above described, to any wharf or wharves or warehouses suitable for storing freight, when requested in writing so to do by a majority in interest of the owners or occupants of such wharves or warehouses; *provided, however*, that no side track shall be laid upon a public street to any wharf or warehouse without the approval of the board of aldermen.

Section 3. Said railway shall be used by said corporation for the transportation of freight only; and the cars thereon shall be drawn only by horse-power, unless the use of other power shall be sanctioned by said board of aldermen.

Section 4. Every steam railway corporation by whose road said Marginal Freight Railway passes, shall, in the manner prescribed by said board of aldermen, connect its

tracks with the same, for the transportation of freight; and every such steam railroad is empowered and required to make such connections; and in making such connections said steam railroad companies shall have all the powers and be subject to all the liabilities set forth in the sixty-third chapter of the General Statutes and in the laws supplemental thereto; and it shall be the duty of said Marginal Freight Railway Company to receive and deliver freight cars at each of said connections and haul the same over its road at their established rates.

SECTION 5. Said Marginal Freight Railway Company shall have the power to fix such tolls for the transportation of freight and the use of elevators as they may, from time to time, deem expedient: *provided*, that said rates shall only be sufficient to pay the expenses of said corporation and to pay a dividend of five per cent. semi-annually upon the capital stock of said corporation.

SECTION 6. The Commercial Freight Railway Company, incorporated by chapter two hundred and sixty-seven of the acts of the year eighteen hundred and sixty-six, is hereby authorized to unite with said Marginal Freight Railway Company, and form one corporation on such terms as said two corporations may mutually agree upon.

SECTION 7. Said corporation may within its authorized limits and for the authorized purposes of this act enter upon and use any part of the tracks of any other street railway and may so strengthen and improve such tracks as to make them suitable for the transportation of freight; and if the corporations cannot agree upon the manner and conditions of such entry and use or the compensation to be paid therefor, the same shall be determined in accordance with the provisions of the twenty-ninth section of chapter two hundred and twenty-nine of the acts of eighteen hundred and sixty-four.

SECTION 8. Said Marginal Freight Railway Company, for the convenient location and use of its tracks and to

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lessen and to prevent inconvenience being occasioned thereby to the public travel, are authorized to widen and alter Tufts, East and Causeway Streets; and to carry into effect the purposes of this act, shall be entitled to all the rights and privileges and shall be subject to all the duties, liabilities and restrictions set forth in the sixty-third chapter of the General Statutes and the laws supplemental thereto, so far as the same may be applicable. And any railroad corporation whose tracks are authorized to be connected with said Marginal Railway Company by this act, shall, for the purpose of properly and conveniently making such connection or for the purpose of enlarging or improving their freight or passenger accommodations in the city of Boston, have all the powers, rights and privileges and shall be subject to all the duties, liabilities and restrictions set forth in the sixty-third chapter aforesaid and the laws supplemental thereto, so far as the same may be applicable.

SECTION 9. The board of aldermen of the city of Boston may, upon the application of said Marginal Freight Railway Company, straighten the streets through which said railway is authorized to pass, and widen said streets so that they shall not be less than fifty feet in width between the curbstones; and said straightening and widening shall be made in accordance with the provisions of chapter one hundred and seventy-four of the acts of the year eighteen hundred and sixty-six; and said Marginal Freight Railway Company shall pay said city one-half of the net cost to said city of such straightening and widening.

SECTION 10. Said Marginal Freight Railway Company shall keep in repair, to the satisfaction of the superintendent of streets of the city of Boston, all the paving between the curb-stones of the streets in which their tracks shall be laid.

SECTION 11. The board of aldermen of the city of Boston, shall, upon the application of any street railway

company used for the conveyance of passengers, and owning tracks in any of the streets which said Marginal Freight Railway Company shall occupy, authorize the company so applying to remove its tracks from such streets and shall grant to said company in lieu of the tracks so removed an equally convenient location in other streets so far as the same may be consistent with the public convenience.

SECTION 22. Said Marginal Freight Railway Company is hereby authorized to erect and maintain elevators for the storage of grain, to purchase and hold such real estate as may be necessary therefor, and to collect the tolls for the use thereof provided for in section five.

SECTION 23. The capital stock of said Marginal Freight Railway Company shall not exceed one million of dollars, and shall be divided into shares of one hundred dollars each: provided, no liabilities shall be incurred by said corporation until one-half of the stock shall have been subscribed by responsible parties and twenty per cent. of the amount of such subscription shall be paid in, in cash.

SECTION 24. The Boston and Worcester Railroad Company, the Western Railroad Company, the Old Colony and Newport Railway Company, the Boston, Hartford and Erie Railroad Company, the Boston and Providence Railroad Company, the Fitchburg Railroad Company, the Boston and Maine Railroad Company, the Eastern Railroad Company and the Boston and Lowell Railroad Company are each of them authorized and shall each of them have the right to subscribe to the stock of said Marginal Freight Railway Company to an amount not exceeding five per cent. of the capital stock thereof as the amount of the same may from time to time be determined: provided, that said subscription shall be made within ninety days from such determination or increase of said capital stock. Notice of such determination or increase shall be sent to the treasurers of each of said rail-

road corporations; and upon the request of said Marginal Freight Company the said railroad corporations before named may, from time to time, make further subscriptions to said capital stock.

SECTION 15. Any freight cars arriving in Boston on either of the above mentioned railroads and containing freight destined to any other of said railroads shall be taken over said Marginal Freight Railroad and delivered to such other railroad without breaking bulk: *provided however*, that this regulation shall only apply to cars containing a full average load.

SECTION 16. This act shall be void so far as it authorizes the construction of the Marginal Freight Railway over the location of the Commercial Freight Railway or through the streets in which the said last named railway is located, also so far as relates to any rights and privileges granted to said Marginal Freight Railway by this act, upon, incident to, or connected with said last named location, unless said Marginal Freight Railway and said Commercial Freight Railway shall unite and form one corporation as they are herein authorized to do, or shall mutually agree upon the joint occupancy of said last named location, or unless said Commercial Freight Railway Company shall consent in writing that said Marginal Freight Railway Company may occupy and lay its tracks upon the location of said Commercial Freight Railway.

SECTION 17. The board of aldermen of the city of Boston shall have full power to regulate the manner and time of running the cars upon said Marginal Freight Railway.

SECTION 18. This act shall take effect as soon as it shall be accepted by the board of aldermen of the city of Boston.

Approved April 25, 1867.

Acts and Resolves of Mass., 1869, chap. 461, Sec. 5.

An act authorizing the extension of the Boston and Albany Railroad to deep water at South Boston, and for other purposes.

. . . . . .

SECTION 5. Said Boston and Albany Railroad Company are also authorized to purchase the whole or any part of that portion of the Boston, Hartford and Erie Railroad built or authorized to be built between the Brookline branch of said Boston and Albany Railroad and any point in the town of Woonsocket, in the state of Rhode Island; also to purchase or lease, connect with, enter upon and use, subscribe for and hold, the whole or any part of the railroads, rights, property, franchises, or capital stock, either of the Mystic River Railroad or of the Marginal Freight Railway Company, or of the South Boston Freight Railway Company, or of any one or more of said companies, or to loan money to either any one or more of said companies, or on the pledge of stock thereof, and to make such temporary or permanent contracts as shall be deemed expedient to complete or to aid in the completion of any railroad hereby authorized to be purchased. Said company may procure insurance on goods in their custody, whether as carriers or warehousemen, and issue negotiable receipts therefor. The said Marginal Freight Railway Company is hereby authorized to locate and construct its tracks on Atlantic Avenue, in the city of Boston, when opened for use. It may also contract with the city of Boston for the extension of Broad Street from its intersection with Federal Street to the intersection of Tufts and Lincoln Streets, and to lay its tracks on such extension. If no contract is made within two months from the passage of this act, the said company may take, purchase and hold a strip of land not exceeding thirty feet in width between said points. Said Boston and Albany Railroad Company may also unite and consolidate with itself in one corporation, and with their consent, the

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Albany and West Stockbridge Railroad Company, and the Hudson and Boston Railroad Corporation, existing in the state of New York, under the name of the Boston and Albany Railroad Company, with all the powers, privileges, rights and franchises, and subject to all the obligations and restrictions given or made and provided by chapter three hundred and forty-seven of the acts of the year eighteen hundred and fifty-five, as to the Western Railroad Corporation.

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NEWBURYPORT WATER COMPANY, APPELLANT,

v.

CITY OF NEWBURYPORT, APPELLEE.

No. 182.

APPELLEE'S BRIEF.

STATEMENT.

The appellant is attempting, by a bill in equity in the Circuit Court of the United States, to avoid its own sale of its water works to the city, under a statute which gave it the option of such sale on specified terms as an alternative to municipal competition, and to set aside the proceedings of the Supreme Court of the State, set on foot by itself under the same statute, for ascertainment of the purchase price, in which no Federal or other constitutional question was raised; on the ground that these proceedings amount to a *taking* of its property without just compensation, in violation of the due process requirement of the 14th Amendment, as the statute did not provide for payment for its franchise rights; and that the statute impairs the obligation of its hydrant contract with the city.

The substance of the case, as stated in the final opinion of the Circuit Court (Record, pp. 113, 114, 120-122), is as follows: —

While the appellant (hereinafter called the company) was engaged in supplying the city of Newburyport, the appellee (hereinafter called the city) and its inhabitants with water, under a non-exclusive franchise and a hydrant contract with the city, the legislature granted to the city, by St. 1893, c. 471, authority to supply itself and its inhabitants with water, with authority also to purchase the company's property if offered; which the city voted not to do. Thereupon the company applied for relief to the legislature, which, by St. 1894, c. 474, forbade the city to supply itself under St. 1893 unless it should first purchase the company's property, if offered, at "the fair value of said property for the purposes of its use by said

city . . . without enhancement on account of future earning capacity or good will or on account of the franchise of said company;" to be ascertained by commissioners appointed by the Supreme Judicial Court, their award when accepted by the court to be final. (Record, pp. 33, 34.)

The company immediately voted to offer and offered its property to the city under the statute; the city voted to purchase it; the company conveyed it to the city by deed; commissioners were appointed by the court, on the company's petition, and after extended hearings made an award of $275,000, which was unsatisfactory to the company. The company presented and argued its case before a single justice, and thereafter before the full law court, making no claim of Federal right and raising no Federal or other constitutional question (Record, p. 13); and the award was accepted by the court. (168 Mass. 541; Record, pp. 53-56.)

Thereupon the company filed in the Circuit Court of the United States the bill from dismissal of which this appeal is taken, claiming that these proceedings amounted to a taking of its property without just compensation, and a denial of the equal protection of the laws, in violation of the due process and equality requirements of the 14th Amendment, on the ground that the sale and deed of its property were made under compulsion of the statute, amounting to duress, and without payment for its franchise rights, especially its right to lay pipes in the streets; and that they impaired the obligation of "contracts belonging to said company and to its stockholders" (Record, p. 15) in violation of the contract clause, of the Federal constitution; praying that all the proceedings under St. 1894 be adjudged void, the deed cancelled and the property restored, or that just compensation therefor be ascertained and the city ordered to pay the same; and for injunction against payment of the award or interfering with the works, and for a receiver.

The Circuit Court overruled a motion to dismiss for want of jurisdiction, and a demurrer on this and other grounds (Record, pp. 57, 95, 96); heard the question of a taking of property, which alone the company then desired to be heard (Record, p. 92), on bill, answer and stipulation of facts; and held that the grant to the city of a competing franchise was within the power of the legislature,

as the company's franchise was not exclusive; that this did not amount in law to duress or compulsion; that the company's conveyance of its property to the city was in law voluntary; and that it had not been deprived of its property without due process of law, in violation of the 14th Amendment. (Record, pp. 113, 127.)

Then the company, for the purpose of laying a foundation for a claim of impairment of contract, applied for leave to introduce the testimony of the valuation commissioners that its hydrant contract with the city was not actually included or valued in their award. (Record, pp. 94, 107.) The court, without passing upon the admissibility of the evidence at that stage, held it to be immaterial and ineffectual, if admitted; on the grounds that the statute could not be made to impair the obligation of contracts by any action of the commissioners, and that all the company's proceedings had already been adjudged voluntary; and entered a final decree dismissing the bill, from which this appeal is taken. (Record, pp. 107, 128, 129.)

PRELIMINARY GROUNDS OF DISMISSAL OR AFFIRMATION, NOT INVOLVING THE MERITS.

The bill might properly have been dismissed below, and the decree appealed from may now properly be affirmed, or reversed for the purpose of dismissing the bill, upon grounds not taken in the opinion of the Circuit Court or assigned as error, preliminary to and not involving consideration of the merits or the constitutional questions.

1. The bill does not present a case "arising under the Constitution or laws of the United States," in the sense of the act of Aug. 13, 1888, of which the Circuit Court could properly entertain jurisdiction.

2. By its proceedings under St. 1894, the company is precluded and estopped from denying its constitutionality, and from asserting the claim of violation of Federal right stated in the bill; which therefore presents no Federal question of which the Circuit Court could properly entertain jurisdiction.

3. By electing to accept St. 1894, and by proceeding thereunder to acceptance of the award, the company waived its right to resort to another and different remedy, and is estopped from so doing.

4. The bill is in the nature of a bill of review, or an appeal from and attempt to set aside the proceedings and judgment of the State court, which is not within the powers of the Circuit Court.

Jurisdiction of the Circuit Court.

I.

This is not a Suit "arising under the Constitution of the United States."

The bill does not present a case "arising under the Constitution or laws of the United States," within the meaning of the act of Aug. 13, 1888 (originally St. March 3, 1875) extending the original jurisdiction of the Circuit Courts. (25 St. L. 433.) The bill should have been dismissed by the Circuit Court for want of jurisdiction, on the city's motion (Record, pp. 95, 96); and the decree may now be reversed for the purpose of ordering such dismissal, according to the rule of the cases below cited.

It is not enough to give the Circuit Court jurisdiction that there may be a Federal question in the case. It is settled that the "suits arising under the Constitution or laws of the United States," in the sense of the act of 1888, do not include all the classes of which this court has appellate jurisdiction from the State courts under Rev. Sts., § 709.

Cooke *v.* Avery, 147 U. S. 375, 385, and cases cited.

The original jurisdiction of the Circuit Court is much narrower, and seems from the decisions to be confined to cases in which the construction of the Federal Constitution or laws is directly involved. "If from the questions it appears that some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the act of 1875; otherwise not."

Starin *v.* New York, 115 U. S. 248, 257, and cases cited.

If the cases mean, as they appear to, that jurisdiction exists only when a new construction is sought, and that a mere question whether the Federal Constitution has any relation or application to

the case is not enough, the present case is not within the rule. The plainest expression on this subject seems to be that of Mr. Justice Brewer while in the Circuit Court: "When a proposition has once been decided by the Supreme Court, it can no longer be said that in it there still remains a Federal question." (Kansas *v.* Bradley, 26 Fed. 289, 290.) This was a removal case, but the same principle is applicable here, especially as this bill is nothing but an attempt to remove into the Circuit Court for re-trial a case already tried and determined in the Supreme Court of the State.

No question of the construction of the Constitution is involved in the case presented by the bill. The company, evidently accepting the established construction of the 14th Amendment, that a taking of property by or under authority of a State without due provision for compensation is a failure of due process, and the construction of the contract clause established ever since the Dartmouth College case, says that the Massachusetts statute of 1894 and the proceedings under it amounted to a taking of its property without just compensation, and therefore to violation of the due process requirement; and that it had a contract which was taken and not paid for and was thereby impaired.

The only question actually presented by the bill is whether the proceedings amounted to a taking of the company's property. The contract question depends on this, as confessedly there was no impairment of contract unless there was a taking of property. Whether there was a taking of property is not primarily a Federal question; whether the company had an impairable contract is not primarily a Federal question; and neither question calls for any construction of the Federal Constitution, with which it has nothing to do.

The question presented, upon which the right to maintain the bill depends, is of the effect of proceedings by or under authority of the State, upon rights derived from the State and not from the United States. The only color of a Federal question is whether the Federal Constitution, however construed, has any application to the case. It is claimed that it has; but it is not claimed that its applicability or effect depends upon any question of its construction, nor is any particular construction sought which will make it applicable while a different construction might not.

This is wholly foreign to the test established by the cases. It is not a claim which "will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction." (Starin *v.* New York, *ubi supra.*) The case is plainly with the rule that the repugnancy of a State statute or proceeding to the Federal Constitution "is to be passed upon by the State courts in the first instance, the presumption being in all cases that they will do what the Constitution and laws of the United States require; and, if there be ground for complaint of their decision, the remedy is by writ of error under section 709 of the Revised Statutes."

New Orleans *v.* Benjamin, 153 U. S. 411, 424.

See also

McGirr *v.* Des Moines, 174 U. S. 168, 181.
Evansville Water Supply Co. *v.* Mobile, 175 U. S. 109.
Defiance Water Co. *v.* Defiance, 191 U. S. 184, and cases cited.
Owensboro *v.* Owensboro Water Co., 191 U. S. 358.
Interstate *v.* Blackburn, 191 U. S. 405, 413.

II.

Waiver of the Federal Question and Estoppel by taking the Benefit of the Statute.

For another reason, the Circuit Court should have declined jurisdiction of the bill, and the decree may now be reversed for the purpose of dismissing it.

It is an established and familiar rule that one who takes the benefit of a statute is held thereby to have waived any right to thereafter attack it as unconstitutional or otherwise invalid. Upon the facts disclosed in this record, the present case is directly within this rule; the company was estopped to assert that the statute is in violation of the Federal Constitution; and, accordingly, the bill presents no Federal question of which the Circuit Court should have entertained jurisdiction.

Electric Co. *v.* Dow, 166 U. S. 489, is conclusive. A statute providing damages for flowing land gave each party a right to elect jury trial, and prescribed that fifty per cent. should be added to the verdict. The State court held that the company, by claiming a jury and going to trial of a petition against it, was estopped to question the constitutionality, under the 14th Amendment, of this provision.

This court concurred in this view, held that for this reason no Federal question was presented, and dismissed the writ of error, saying: "The plaintiff in error, by availing itself of the power conferred by the statute and joining in a trial for the assessment of damages, is precluded from denying the validity of that provision which prescribes that fifty per cent. shall be added to the amount of the verdict. The act confers a privilege, which the plaintiff in error was at liberty to exercise or not, as it thought fit."

This case shows also that, if the company had asserted this Federal claim in the State court, and had there been held estopped to raise it, as it properly should have been, this court on writ of error would have refused to consider it. It is clear, therefore, that the company, by this bill, is taking advantage of its own laches and default in omitting to raise the Federal question in the State court, to secure a consideration of it by this court to which it would not have been entitled in the regular course of procedure. If not entitled to it there, it cannot be entitled to it here.

The principles of waiver and estoppel belong to general jurisprudence, and are of general application, alike in State and Federal courts. If the company was precluded by its conduct from asserting this alleged violation of Federal right in the State court, it is equally precluded from asserting it in a Federal court.

In City Railway Co. *v.* Citizens Railway Co., 166 U. S. 557, 568, the court held the company disabled from questioning the validity of an ordinance by its previous application for it, notwithstanding it was not subsequently accepted. This is especially in point here, as the company, by its own petition, sought the act of 1894 (Record, pp. 5, 6, 32), which it now attempts to avoid after taking advantage of it.

See also

Clay *v.* Smith, 3 Pet. 411.
Chapman *v.* Forsyth, 2 How. 202.
Daniels *v.* Tearney, 102 U. S. 415, 421.
Gibbs *v.* Baltimore Gas Co., 130 U. S. 396, 408.
Cole *v.* Cunningham, 133 U. S. 107, 115.
Ashley *v.* Ryan, 153 U. S. 436, 441.
Pierce *v.* Somerset Railway, 171 U. S. 641, 648.
Hale *v.* Lewis, 181 U. S. 473, and cases cited.
O'Brien *v.* Wheelock, 184 U. S. 450, 491.

The law of Massachusetts upon the subject is shown in the following cases: —

Haskell *v.* New Bedford, 108 Mass. 208, 213.
Bancroft *v.* Cambridge, 126 Mass. 438, 442.
Eustis *v.* Bolles, 146 Mass. 413.
Braintree Water Co. *v.* Braintree, 146 Mass. 482, 486.
Rockport Water Co. *v.* Rockport, 161 Mass. 279.
Citizen's Gas Lt. Co. *v.* Wakefield, 161 Mass. 432, 439.
Hudson Elec. Light Co. *v.* Hudson, 163 Mass. 346, 348.

III.

Waiver and Estoppel by Election of Remedy.

This ground of objection to the bill, cognate to but not precisely the same as the preceding, may oust the jurisdiction of the Circuit Court, or, if not, it furnishes another reason for dismissing the bill there, upon which the decree should now be affirmed.

When St. 1894 was enacted, the company, as shown above, had a choice of rights and of remedies. It could avail itself of the statute and sell its property to the city on the statutory terms, or, if it believed the statute unconstitutional, as an attempt to deprive it of its property without proper compensation, as now asserted, it could resort to the express remedy provided by section 4 (Record, p. 34), to restrain the city from any attempt to supply itself with water under it; or, if unwilling to risk omitting to make the offer of sale within the thirty days limited by the statute (Record, p. 33), it could, as shown above, make the offer provisionally, to save its rights, and bring a bill against the city forthwith to determine the constitutional questions; or the company could make the offer of sale in such a bill, brought within the thirty days, conditionally upon the statute being held constitutional.

The company made its choice, and, instead of resorting to either of these courses, elected to avail itself of the statute. It cannot now resort to the other remedy, as it is attempting to do by this bill. When a party has a choice of remedies, he cannot exhaust one and then resort to the other because he is disappointed in the result of the first. The case is within the principle, if not the rule, of *res judicata*.

The removal acts, which involve the same principle, "do not

contemplate that a party may experiment on his case in the State court, and, upon an adverse decision, then transfer it to the Federal court. Here, Rosenthal has gone through the State trial and appellate courts, and his rights have been finally declared by the Supreme Court of the State; and, though as yet no formal decree has been entered in the trial court, it is none the less true that he has experimented with the State courts and been beaten, and now seeks a different forum."

Rosenthal *v.* Coates, 148 U. S. 142, 147.

"Any decisive act by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies; and one of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action based upon such act."

Robb *v.* Vos, 155 U. S. 13, 43.

The plaintiff "voluntarily commenced an action in the Supreme Court of the State to have the claim established. She invoked the jurisdiction of that court. . . . The questions . . . were within the undoubted cognizance of the Supreme Court. She voluntarily sought its judgment. Can she, after its decision, be heard in any other tribunal to collaterally attack the validity thereof? Does not the principle of *res judicata* apply in all its force? Having litigated a question in one competent tribunal, and been defeated, can she litigate the same question in another tribunal, acting independently, and having no appellate jurisdiction?"

Forsyth *v.* Hammond, 166 U. S. 506, 517.

"The plaintiff in error sought in the State court, and was given opportunity, to litigate the rights claimed by it; and it cannot complain that the guarantees of the Constitution of the United States were denied because the litigation did not result successfully."

Remington Paper Co. *v.* Watson, 173 U. S. 443, 451.

See also

Graham *v.* Boston H. & E. R. R., 118 U. S. 161, 177.
Manning *v.* Amy, 140 U. S. 137, 141.
Wilson *v.* Lambert, 168 U. S., 611, 618.
Mitchell *v.* First Nat. Bank, 180 U. S. 471, 482.
Bienville Water Co. *v.* Mobile, 186 U. S. 212, 216, 217.
Connihan *v.* Thompson, 111 Mass. 270, 272.

Under these conditions, the bill does not present, *bona fide*, a real Federal question. The Federal claim is simulated, for the purpose of getting a new trial. The suit "does not really and substantially involve a dispute or controversy properly within the jurisdiction of the Circuit Court," in the sense of St. of March 3, 1875, § 5, 18 Sts. 470; and the bill might have been dismissed below upon this ground.

Cases *supra*, under par. I, p. 6.

See also

New Orleans Water Works Co. *v.* Louisiana, 185 U. S. 344, 345, and cases cited.

THE BILL IS IN THE NATURE OF A BILL OF REVIEW, OR APPEAL.

The bill is an attempt to take advantage of the enlarged jurisdiction conferred upon the Circuit Courts by the act of 1888 (25 St. L. 433), by way of review, or appeal from the State court, to set aside proceedings of that court within its unquestioned jurisdiction, invoked by the company itself, in which the company submitted to and took the judgment of that court upon every question which it desired to raise, without raising any Federal question, and in which all rights now asserted could have been determined, with a right of review of any Federal question in due course by writ of error to this court.

The bill adds nothing to the case as it was before the State court. No *fact* forming any part of the case stated in the bill has transpired since it filed its petition in the State court, except the award and judgment which followed upon that petition. The bill is simply an attempt to get the Federal court to give a different legal effect to precisely the same facts which were before the State court. In other words, it does not present a new or different case, but is an attempt to get from another court a different result from the same case.

Such an attempt is especially undeserving of encouragement in the present case, for the reason that every claim of Federal right now asserted in this bill could have been fully availed of and secured in the State court, with a right of review by this court, at any stage of the proceedings. By negligence or want of belief in the Federal

rights now asserted, the company passed by the Federal remedy, which was equally open to it in the State court, and is now trying to recover it by this bill, because the result there was unsatisfactory.

The company has contended that St. 1893 never took effect until re-enacted by St. 1894. If this is so, clearly the company was neither harmed nor endangered by St. 1893, nor until the passage of St. 1894. But, if the company apprehended municipal competition after the city had accepted St. 1893 and had voted not to purchase the company's property, and claimed or believed that any constitutional right was or could be violated under that statute, it could have gone into court at any time after the acceptance of St. 1893 by the city, Sept. 7, 1893, by bill in equity to enjoin the city from proceeding under it. In such a suit every constitutional right of the company could have been asserted and secured, with the right of review by writ of error to this court of any Federal claim.

Instead of going to the court for relief at that stage, the company went to the legislature, and procured St. 1894, forbidding the city to supply itself under St. 1893 without first purchasing the company's property.

It is certain that St. 1893 was in effect, subject to the condition of purchase imposed by St. 1894, after the passage of the latter statute. If the company believed that St. 1894, or the two statutes together, violated any of its constitutional rights, it could forthwith have gone into equity, at any time after the passage of St. 1894, to enjoin the city from proceeding under that statute, or under both or either; and in such suit every constitutional question now raised, or which the company desired to raise, could have been raised, and every Federal question reviewed on error to this court.

Instead of this, the company hastened to take advantage of St. 1894, by offering and conveying its property to the city, and petitioning for the appointment of commissioners to value it.

It is equally plain that the company could have raised, under that petition, in the State court, any constitutional question now raised, unless estopped by the sale; and if estopped there, it is equally

estopped here. The only violation of Federal right asserted in the present bill is that the company is deprived of its property without just compensation, in violation of due process of law, because the statute did not provide payment for its franchise rights; and that the statute impaired the obligation of its hydrant contract, because the contract was not actually included and valued in the award. It is too plain for argument that the company could have raised these questions under its petition in the State court; by asking that court to hold the valuation clause of the statute in conflict with the 14th Amendment unless construed to include payment for franchise rights; and in conflict with the contract clause unless construed to include the hydrant contract as a subject of valuation; and, upon an adverse ruling, would have had a complete remedy by writ of error to this court.

But the company, as is openly confessed in the bill, asserted no Federal right and raised no Federal question. (Record, p. 13.) The bill attempts to give a reason for the omission (Record, pp. 13, 14), of which it is sufficient to say that it is neither a legal reason nor an excuse. It was never before heard of that a party can try out his case under a statute, to a finality, without raising any constitutional question, and then claim as of right to have the proceedings avoided on the ground that the statute was "novel," and the view taken of it by the court "unexpected." This can be no more than ground for a new trial or re-hearing, and the company practically confesses it so. It is trying to get a re-hearing of its case in another court.

The case of Moore *v.* Sanford, 151 Mass. 285, was much relied on below as excusing this omission. This is a misunderstanding and misapplication of that case; which decides only the familiar proposition that in a petition for damages for a statutory taking of property the validity of the taking cannot be questioned; in other words, it cannot be denied that the property has been taken. But this was not the company's situation. The present bill does not deny the power of the State to take the company's property for the city of Newburyport, nor does it deny the validity of the proceedings which are alleged to amount to a taking of it, except for the single reason that the compensation provided is inadequate. It

asserts a taking, and stands upon it, and complains only of the compensation. It has already been shown that every constitutional question, State or Federal, relating to the sufficiency of the compensation, could have been raised and availed of in the proceedings in the State court. The rule of Moore *v.* Sanford has no application to the case; unless, indeed, when understood, it is authority against the right to maintain this bill.

See also Boston & Maine Railroad *v.* Graham, 179 Mass. 62, 67.

The case in the State court was at an end before this bill was filed, July 21, 1897. Under the statutory provision that the award when accepted by the court should be final (Record p. 34), the judgment of the State court accepting the award, June 14, 1897, was enough. (Record pp. 53, 56.) The company's petition for rehearing (Record, pp. 13, 14) did not reopen or affect that judgment, and it was dismissed before the hearing on demurrer in the Circuit Court (Record, p. 91.)

While this may not oust the jurisdiction of the Circuit Court (Huntington *v.* Laidley, 176 U. S. 668), it is not within the power of that court to review and reverse or set aside the proceedings of a State court acting within its jurisdiction, by way of appeal, or under the conditions here disclosed. The Federal statutes above referred to, extending the original jurisdiction of the Circuit Courts, do not give them any new or general supervisory power over proceedings in the State courts, especially if the Federal rights asserted might have been effectively asserted there, but were not.

In Barrow *v.* Hunton, a removal case, where there was diversity of citizenship, the court said: "If the proceeding is merely tantamount to the common law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review or an appeal . . . the United States court could not properly entertain jurisdiction of the case. Otherwise, the Circuit Courts of the United States would become invested with power to control the proceedings in the State courts, or would have appellate jurisdiction over them, in all cases where the parties are citizens of different States. Such a result would be totally inadmissible."

The same principle applies with at least equal force to a case like

this, essentially a bill of review, for which the alleged Federal claim is the only ground of jurisdiction.

Barrow *v.* Hunton, 99 U. S. 80, 83.
Nougue *v.* Clapp, 101 U. S. 551, 554.
Blythe *v.* Hinckley, 173 U. S. 501, 508.
Defiance Water Co. *v.* Defiance, 191 U. S. 184, 191, and cases cited.

See also Hendrickson *v.* Bradley, 85 Fed. 508, 514 and cases cited. (Ct. Ct. App. 7th ct.) S. C. (petition for certiorari denied), 171 U. S. 686.

ARGUMENT AND AUTHORITIES ON THE MAIN QUESTION OF DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW. — SPECIFICATIONS OF ERROR I.–VI.

The first six specifications of error (Record, pp. 131, 132) are only different forms of raising this question, and may be conveniently considered together. Specification III. is unwarranted in form. The Circuit Court did not hold "that the sale of the company's property was compulsory in fact."

The ground of the company's claim of deprivation of property without due process of law is that the Massachusetts statute of 1894, or Sts. 1893 and 1894, taken together, in effect compelled the company, in order to avoid ruinous municipal competition, to sell its property to the city for less than its fair value, as the sale is to be "without enhancement on account of future earning capacity or good will or on account of the franchise of said company" (Record, p. 34); that this amounted in law to *duress*, entitling the company to avoid its deed and have the property restored; or that the statute and the proceedings thereunder amounted to a taking of its property without just compensation, and therefore without due process of law; and, accordingly, that the company is entitled to have the sale decreed void and the property restored, or, if retained by the city, to have compensation for its franchise rights; for which, in the alternative, the bill prays. (Record, pp. 16, 17.)

Whether the conveyance was made under duress is not a Federal question. Duress, if proved, would only entitle the company, at

most, to avoid the conveyance and have the property restored. It would not establish a taking of it, nor present any Federal claim. Yet the claim is that the proceedings amounted to taking the property, as by eminent domain, without just compensation, and therefore without due process of law, in violation of the 14th Amendment.

This claim, based as it is upon a sale and conveyance by the complainant, has the merit of entire novelty. To establish the Federal right the company must show both a taking of its property, without which the constitutional requirement of just compensation does not apply, and a failure of just compensation, since the constitution requires this only in the case of a taking. The company does not and cannot deny the power of the State to take its property for the use of the city of Newburyport. The thing complained of is not want of power to take, but failure to provide just compensation as upon a taking. This is necessarily relied on, as well as the alleged compulsion, to make the transaction, which otherwise would plainly be a sale, amount to a taking without due process of law. The claim is that the property was *taken* without due process, not merely because the company was *compelled* to sell it, but was compelled to sell it for *less than its value*.

In short, the Federal claim, reduced to its elements, is that there was a taking *because* there was a failure of just compensation, and that there was a failure of just compensation *because* there was a taking. The premise of each proposition is the conclusion of the other, and the conclusion of each is nothing but the unestablished premise of the other. It runs in a circle. So perfect a specimen of one of the absurdest fallacies is not often found outside the text-books of logic.

The claim involves the further absurdity that, while the legislature had undoubted power to repeal the company's franchise without compensation, and undoubted power to give the city a competing franchise, yet if in doing either it gives the company a right to sell its property to the only customer who can use it, the act becomes unconstitutional.

To make the claim impressive, the bill alleges that the franchise rights of which the company is deprived were worth "more than the sum of $475,000." (Record, p. 16.) It is plain from the context that this precise valuation of so indefinite a thing is reached by the simple process of capitalizing at four per cent. the company's

earnings of $30,000, which yields $750,000, and calling the value of the franchise right in the streets the difference between this sum, which includes the whole earning power of the property employed in the business, as well as of the franchise, and $275,000, the amount of the award ($750,000 — $275,000 = $475,000). (Record, p. 16.) The formidable appearance of the claim is further impaired by the facts that the company's charter was terminable at any time by purchase by the city (charter, section 11; Record, p. 21); was repealable at any time by the legislature (Mass. Gen. Sts., 1860-1882, c. 68, § 41; Record, pp. 3, 4); was not a monopoly, but was subject to competition (179 Mass. 382); and the business a public service, subject to legislative regulation as to rates and otherwise. The company's capital was limited to $300,000 (charter, section 9; Record, p. 21); the answer denies that the whole property and franchise rights were worth more than the amount of the award (Record, p. 68, and p. 10, par. 7); and the company produces no evidence on the question of value.

The company made no point below of the provision of St. 1894, that the property should be valued "for the purposes of its use by said city" (Record, p. 34); evidently conceding, as it must, that this is and is intended to be for its own benefit; as none but the city was authorized by law to use the property, and it would therefore be practically worthless for sale to any other. While generally in eminent domain a limitation to the value for the purchaser's use would be void, this is not a limitation but an enhancement, assuring the fair value. The property is capable of but one use; that is the use which the city is to make of it; it is worth its full value for that use by the city; and worth more to the city than it can be worth to any other customer.

See Greenwood *v.* Freight Co., 105 U. S. at p. 23.

However this may be, this clause adds nothing to the case. If the statute and the proceedings are otherwise valid, this clause cannot make them invalid.

The Circuit Court disposed of this claim by holding, in effect, that the grant to the city of a competing franchise by Sts. 1893 or 1894, or both, being within the constitutional power of the Legislature, as the company's franchise was not exclusive, could not and did not

in law amount to duress or make the company's sale compulsory or voidable; that the sale was voluntary in law; and therefore that the company had failed to show any taking of its property without just compensation. (Record, p. 127.)

It is clear, both on reason and authority, that this conclusion was right, and was unavoidable. There are several short and conclusive answers to the whole case: —

1. While unlawful compulsion might entitle the company to avoid the sale and have the property restored, this involves no Federal right, and presents no Federal question. And when the property is restored, no question of compensation remains.

2. The only effect of the statute was to authorize the city to compete with the company. It is settled that competition with a non-exclusive franchise does not amount to a taking of property or impairment of contract. On the face of the bill, there is no violation of any Federal right.

3. The Massachusetts court holds in this case that the city acquired its franchise rights directly from the State, and not from the company; from which it follows that the company's franchise rights did not pass to the city by the statute or conveyance. (Newburyport Water Co. *v.* Newburyport, 168 Mass. 541, 553.) This court will accept this construction of the statute. (W. W. Cargill Co. *v.* Minnesota, 180 U. S. 452, 456, and cases cited.) If the franchise rights did not pass by the conveyance, they cannot be taken, nor call for compensation.

4. But if they were repealed by the statute, or even if they passed to the city, the Greenwood case, 105 U. S. 13, and others, are conclusive that there is no constitutional right to compensation for them. And, as repeal or termination of the company's franchise disables it from further performance of the hydrant contract, the claim of impairment of contract falls with the claim of a taking of property.

We understand from counsel that the broad claim of an exclusive right to supply water in Newburyport, implied or resulting from the legislation, as set out in paragraphs 3, 4, and 6 of the bill (Record, pp. 1-3), will not be raised here. And, as to the hydrant contract,

the company did not claim below that the contract was exclusive, and this cannot be claimed. Attention is called to some features of it (Exhibit D, Record, p. 26) : —

1. No legislative authority is shown for the making by the city of an exclusive contract. The provisions of the company's charter, by virtue of which the contract was made, do not contemplate, and are insufficient to authorize, an exclusive contract. (Charter, section 8; Record, p. 20.)

2. The contract is, in terms, non-exclusive. The only promise of the city is that it will "pay therefor to the party of the first part the sum of $6,000 in each and every year during the existence of this contract." There is no promise not to seek another or further supply at any time, if it sees fit. There is no promise, in terms, to continue payment for twenty years. The sole obligation of the city is to continue the stipulated payments "during the existence of this contract;" and this, of course, upon the implied condition of full performance by the other party.

3. The promises fixing the period of the contract are the company's promises, in paragraphs *first* and *second*. (See Knoxville Water Co. *v.* Knoxville, 189 U. S. at p. 436.)

4. The contract is only for a municipal hydrant service, for fire protection. It has no reference to domestic supply of the inhabitants of the city.

Stein *v.* Bienville Water Co., 141 U. S. 67, 81; Hamilton Gas Light Co. *v.* Hamilton, 146 U. S. 258, 268; and Long Island Water Co. *v.* Brooklyn, 166 U. S. 685, 696, cited by the Circuit Court, settle beyond dispute that this contract is non-exclusive, and later cases, equally conclusive, are cited below.

The claim of duress (the subject of Specification of Error IV.) cannot be taken seriously. The element of illegality is wholly wanting; the alleged "threats" ascribed to the legislature and the mayor were either lawful acts in themselves, or no more than the indication of a purpose to do lawful acts; the mayor's statements do not bind the city: and they disappear in the proof. (Record, pp. 9, 90*g*, 93.)

Nor, as already noted, would duress, if proved, establish a taking of the company's property, or present any Federal question. At

most, it would only entitle the company to avoid its deed and have the property restored. There is no Federal element in this claim.

In addition to cases cited by the Circuit Court on duress or "threats," see

French *v.* Shoemaker, 14 Wall. 314, 332.
United States *v.* Huckabee, 16 Wall. 414, 431.
Doyle *v.* Continental Ins. Co., 94 U. S. 535, 541.
Silliman *v.* United States, 101 U. S. 465.
Carver *v.* United States, 111 U. S. 609.
United States *v.* Des Moines Co., 142 U. S. 510, 544.
Lane & Bodley Co. *v.* Locke, 150 U. S. 193, 200.
White *v.* United States, 154 U. S. 661, 663.
Thorne Wire Co. *v.* Washburn & Moen Co., 159 U. S. 423, 444.
Cable *v.* U. S. Life Ins. Co., 191 U. S. 288, 308.
Wilcox *v.* Howland, 23 Pick. 167.
Emmons *v.* Scudder, 115 Mass. 367.
Vegelahn *v.* Guntner, 167 Mass. 92, 107.

The motives, reasons or state of mind of the stockholders in voting the sale (see Bill, par. 12; Record, pp. 13, 91, par. 2) are immaterial. They are bound by the act of the corporation, and their motives are not necessarily to be ascribed to the corporation.

Hawkins *v.* Glenn, 131 U. S. 319, 321.
Glenn *v.* Leggett, 135 U. S. 533, 544.
Louisville Water Co., *v.* Clark, 143 U. S. 1, 13.
Hendrickson *v.* Bradley, 85 Fed. 508, 516, and cases cited.

The whole case centres in the single question whether a grant to a city, by a legislature having a reserved power to alter or repeal all corporate charters (Record, pp. 3, 4), of authority to supply itself with water in competition with a local company operating under a non-exclusive franchise and contract, accompanied with the obligation to buy the company's property, if offered, without payment for its franchise rights, amounts to a *taking* of property held under such franchise; a question settled, in principle, ever since the Charles River Bridge case, and now repeatedly determined

by decisions which directly cover the whole ground of the company's claim.

Of the cases cited by the Circuit Court, Lehigh Water Co. v. Easton, 121 U. S. 388, 390; Stein v. Bienville Water Co., 141 U. S. 67, 81; Hamilton Gas Co. v. Hamilton, 146 U. S. 258, 268; and Long Island Water Co. v. Brooklyn, 166 U. S. 685, 696, are directly in point and are conclusive. The only question is of legislative power to authorize competition with a non-exclusive franchise. It is now settled even that an express stipulation in the contract that the city should not compete would have given the company no exclusive right as against the legislature (Walla Walla case, 172 U. S., at p. 13, as stated in 180 U. S. at p. 618; Browne v. Turner, 176 Mass. 9, 15); and that competition by the city is not excluded where competition by others is not excluded (Joplin case, 191 U. S., at p. 156).

In the Gloucester case, now heard with this case, the Massachusetts court declared the similar franchise of that company non-exclusive, the competing charter to the city no violation of the company's franchise rights, and the sale voluntary. (Gloucester Water Supply Co. v. Gloucester, 179 Mass. 365, 381; Gloucester Record, p. 65.) There can be no doubt that all this would have been held by that court in the Newburyport case, had these questions been material. (See Record, p. 54.)

In addition to cases cited by the Circuit Court on the main question of deprivation of property, see

Citizens St. Ry. v. Detroit Ry., 171 U. S. 48, 53.
Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 14, 15.
San Diego Co. v. National City, 174 U. S. 739, 754.
Freeport Water Co. v. Freeport, 180 U. S. 587.
Rogers Park Water Co. v. Fergus, 180 U. S. 624.
Skaneateles Water Co. v. Skaneateles, 184 U. S. 354.
Bienville Water Supply Co. v. Mobile, 186 U. S. 212.
Knoxville Water Co. v. Knoxville, 189 U. S. 434.
San Diego Land Co. v. Jasper, 189 U. S. 439.
Joplin v. Southwest Mo. Lt. Co., 191 U. S. 150.
Owensboro v. Owensboro Water Co., 191 U. S. 358.

Stanislaus County *v.* San Joaquin Canal Co., 192 U. S. 201.
Kennebec Water Dist. *v.* Waterville, 97 Me. 185, 206.
Newburyport Water Co. *v.* Newburyport, 168 Mass. 541, 553, 554.
Gloucester Water Supply Co. *v.* Gloucester, 179 Mass. 365, 382.
Syracuse Water Co. *v.* Syracuse, 116 N. Y. 167. (In this elaborate case a writ of error to this court was dismissed, apparently for want of prosecution. 154 U. S. 519.)

Some cases on which the company may attempt to rely are plainly distinguishable.

The Monongahela case, 148 U. S. 312, where Congress attempted to take or destroy without compensation a franchise granted by a State, plainly has no application here.

In the Walla Walla case, 172 U. S. 1, the contract, duly authorized, though otherwise non-exclusive, expressly forbade the city to establish new works unless and until the contract should be avoided by judicial proceedings, which had not been done. Except for this provision, it is plain that the contract would have been held not to prevent competition by the city. (See 172 U. S. pp. 14, 15.)

In the Los Angeles case, 177 U. S. 558, the contract, duly authorized by the legislature, expressly bound the city not to reduce rates below a given point, which the city did notwithstanding.

Detroit *v.* Detroit Cit. St. Railway Co., 184 U. S. 368, is sufficiently distinguished from the present case by the court, in the Knoxville case, 189 U. S., at 437.

In the Vicksburg case, 185 U. S. 65, the only question determined by this court was that the Circuit Court had jurisdiction of a bill showing that the company had a contract, in express terms exclusive, for an unexpired period of fifteen years, and that the city had repudiated this contract and was proceeding to build new works.

The company may attempt to distinguish its case from the Skaneateles case, 184 U. S. 354, which is apparently conclusive against it, on the ground that there the contract had expired before the village proceeded to build works, while here it had not; and that there the village stood authorized to build works when the company

was incorporated, while here it did not. But, as the company's charter is non-exclusive, and its hydrant contract equally so (upon which the Long Island case, 166 U. S. 685, 696, is conclusive), it clearly acquired no exclusive rights by putting these two non-exclusive rights together; and, accordingly, the legislature had power to grant the city a competing franchise at any time, notwithstanding the company's charter or contract; and it is immaterial that this was done after the company was incorporated, and pending the contract. The Joplin case, 191 U. S. 150, where the city built its works pending the company's contract, is conclusive against the company on the latter point. In the present case, the city never repudiated the contract, nor manifested any purpose to disturb it, as in the Vicksburg, Freeport and Rogers Park cases.

Additional Grounds of Affirmation on the Merits.

The bill might properly have been dismissed, on the merits, and the decree may properly be affirmed, on other grounds, not taken in the opinion of the Circuit Court.

I.

The Conveyance was Voluntary in Fact.

It is not entirely clear from the opinion below whether the Circuit Court found the company's conveyance to be voluntary in fact. If it was so, the whole case is thereby disposed of. The appeal brings up the facts (151 U. S. 663 and cases). Upon the case disclosed in the record, the company's conveyance of its property was in fact voluntary. It imposes on credulity to assert the contrary.

While the company says that St. 1893 did not take effect until "re-enacted" by St. 1894 (Record, pp. 11, 122), in which view no harm was or could be done by that statute, the company applied to the legislature for relief against it; and this resulted in the enactment of St. 1894, under which all the proceedings were had. (Record, pp. 5, 6.) St. 1894 is plainly, on its face, an act of grace for the relief and benefit of the company; the company forthwith upon its passage hastened to secure the opportunity of sale, voting that it "desires" to sell its property to the city, "agreeably

to the provisions of chapter 474 of the Acts of the Legislature of Massachusetts for the year 1894," specifying its *corporeal* property, with no mention of franchise rights (company's vote, Record, p. 7); deeded the property to the city forthwith upon the city's vote to purchase it, after an interval of six months to consider constitutional and other questions (Record, p. 8); petitioned the Supreme Court a week later for appointment of commissioners to value it; tried its case to the commissioners and the court through a period of two and a half years (Record, pp. 9, 53); raised no Federal or other constitutional question at any stage, and urged no question in court except that its right to lay pipes in the streets should be paid for, and evidence of its earnings admitted on the question of value (Record, pp. 53, 54). When the unsatisfactory award of $275,000 was finally accepted by the court, it was for the first time revealed to the company that the statutes and all these proceedings under them were in violation of the Federal Constitution.

It is impossible not to see that the company rushed to embrace the opportunity of sale held out to it by St. 1894, making the sale not only voluntarily but eagerly; that its first doubt arose only when it had failed to impress the commissioners with its own sense of the value of its property, or to persuade the court to set aside the award; and that the bill is not an assertion, *bona fide*, of violated Federal rights, but a mere attempt to avoid the result of the first trial.

II.

The Reserved Power over Corporate Charters.

The Massachusetts statutes of 1893 and 1894 can be sustained, against the constitutional objections here asserted, under the reserved power of the State over corporate charters.

The reserving statute in force when the company's charter was granted in 1880, in the same form as Pub. Sts. 1882, c. 105, § 3, set out in the bill (Record, pp. 3, 4), is Mass. Gen. Sts. 1860, c. 68, § 41, in force since 1831, as follows: "Every act of incorporation passed after the eleventh day of March in the year eighteen hundred and thirty-one shall be subject to amendment, alteration

and repeal, at the pleasure of the legislature." It is elementary that this becomes part of the terms of every corporate charter thereafter granted.

The effect of St. 1893, if it took effect, was no more than to subject the company to the risk of competition by the city. St. 1894 added nothing to this except to forbid the city to compete unless on condition of purchasing the company's property if offered. The extreme effect of either statute, or both, was, therefore, no more than to subject the company to risk of competition.

Hamilton Gas Light Co. *v.* Hamilton, 146 U. S. 258, 270, and Bienville Water Supply Co. *v.* Mobile, 186 U. S. 212, 222, directly determine that competition may be authorized under the reserved power; in the former case, even if the original charter is exclusive.

If it be said that the company's charter was expressed to be terminable on condition of purchase by the city of its "rights and privileges" as well as its property (charter, section 11; Record, p. 21), the cases are conclusive that this does not amount to contract; in other words, the State did not contract with the company that it should have the exclusive right of water supply in Newburyport until the city should purchase *under the particular terms of its charter*. This provision of the charter, while unexecuted, could be altered like any other; and the statutes of 1893 and 1894 may be regarded as, in effect, an alteration of it in this particular. Having unquestioned power to authorize competition without terms, it had power to alter the terms of purchase prescribed in the charter; as the company could not be compelled to sell, on any terms. The greater includes the less. The same thing was done, and was sustained, in

Long Island Water Co. *v.* Brooklyn, 166 U. S. 685, 697.

See also

Browne *v.* Turner, 176 Mass. 9, 14.

The cases go much farther. It is settled that the legislature, in the exercise of the reserved power, could have directly repealed the company's franchise, without compensation, and taken or authorized the city to take its corporeal property, making compensation for that alone. In other words if this had been, as it is alleged to be, an

actual *taking* of the company's property, without compensation for the franchise rights, the reserved power would sustain it.

Greenwood *v.* Freight Co., 105 U. S. 13, is in point, and is conclusive. Here the legislature, under the reserved power, repealed the charter of a railroad company, and by the same act incorporated a new company and conferred upon it the franchise rights of the former, with a requirement to take its tracks, making compensation therefor; amounting to a taking and transfer of the franchise rights of the first company to the second, with compensation only for the corporeal property. This was sustained under the reserved power, and this case has repeatedly been affirmed.

And the city could not, by contract, exclude or affect the exercise of the reserved power of the State.

The repeal of the charter would have put an end to the company's power to further perform the hydrant contract; as, if not, a corporation could put itself, by contract, beyond reach of the reserved power; which is not the law.

Sioux City Street Ry. Co. *v.* Sioux City, 138 U. S. 98, 107.
Long Island Water Co. *v.* Brooklyn, 166 U. S. 685.
Browne *v.* Turner, 176 Mass. 9, 15.
Kennebec Water Dist. v. Waterville, 96 Me. 234, 252-3.

The reserved power, by its express terms, may be exercised "at the pleasure of the legislature;" but, if reasons were necessary, there can be no doubt that the conduct of the company in unlawfully injecting the polluted Merrimac River water into its supply, as disclosed here (Stipulation, Record, pp. 89, 90; and see also the next par. III of this brief), was enough to warrant the unconditional repeal of the company's charter.

See further,

Tomlinson *v.* Jessup, 15 Wall. 454, 458.
Beer Co. *v.* Massachusetts, 97 U. S. 25, 30.
Bridge Co. *v.* United States, 105 U. S. 470.
Spring Valley Water Works *v.* Schottler, 110 U. S. 347.
Louisville Water Co. *v.* Clark, 143 U. S. 1, 13, 17.
Schurtz *v.* Cook, 148 U. S. 397, 410.
N. Y. & N. E. R. R. *v.* Bristol, 151 U. S. 556, 567.
Covington *v.* Kentucky, 173 U. S. 231, 240.

St. Louis, etc., R. R. *v.* Paul, 173 U. S. 404.
Looker *v.* Maynard, 179 U. S. 46.
Louisville, etc., R. R. *v.* Kentucky, 183 U. S. 503, 516.
Knoxville Water Co. *v.* Knoxville, 189 U. S. 434.

For the law as held in Massachusetts upon this subject, see,
Worcester *v.* Norwich & Worcester R. R., 109 Mass. 103, 112.
Metropolitan R. R. Co. *v.* Highland Railway, 118 Mass. 290, 293.
Worcester, &c, R. R. Co. *v.* R. R. Commissioners, 118 Mass. 561, 568, and cases cited.
Thornton *v.* Marginal Freight Railway, 123 Mass. 32. (Affirmed in Greenwood *v.* Freight Co., *supra.*)

III.

The Police Power.

Upon the facts of the case, the Massachusetts statute of 1893 can be sustained as an exercise of the police power for the protection of the public health and safety. If this statute is sustained, St. 1894, which was solely for the relief and benefit of the company, can furnish no ground of complaint.

The record discloses that in June, 1892, the company, having previously in 1889 laid a pipe from its works to the Merrimac river, which it was not authorized to use as a source of supply, began surreptitiously to pump the water of the river into its pipes, which supplied the city and its inhabitants. This was in violation of its charter (Section 2; Record, p. 19) and of the general law, Mass. Sts. 1888, c. 375, the material part of which is as follows: —

"The state board of health shall have the general oversight and care of all inland waters . . . shall . . . cause examinations of the said waters to be made for the purpose of ascertaining whether the same are adapted for use as sources of domestic water supply, or are in a condition likely to . . . imperil the public health . . . shall from time to time consult . . . with corporations . . . having or intending to introduce systems of water supply . . . as to the

most appropriate source of supply. All such corporations . . . are hereby required to give notice to said board of their intentions in the premises, and to submit for its advice outlines of their proposed plans or schemes in relation to water supply."

It appears that at the point where the river water was taken it was carrying the sewage of Lowell, Lawrence, Haverhill and Amesbury, having an aggregate population of 158,000 inhabitants, discharged into it from 1½ to 24 miles above that point; that the State Board of Health had disapproved the use of the river, without filtration, as a source of domestic water supply, and in November, 1892, cautioned the company against the use of it, and that "very little was pumped thereafter;" that sickness in the city during the winter of 1892–93 was attributed by physicians and the State Board of Health to this improper use of the Merrimac river water; and that these facts were put in evidence or were admitted by the company before the legislative committee which had charge of the city's petition for the statute of 1893, at the hearings held at the session of the legislature of that year at which that act was passed. (Stipulation of Facts, Record, pp. 89, 90.)

While the motives of the legislature may be immaterial, it is familiar that the facts or circumstances constituting the situation out of which legislation arises, "as it was pressed upon the attention of the legislative body," may be considered in construing it.

Holy Trinity Church *v.* United States, 143 U. S. 457, 463.

There can be no doubt that discovery of this misconduct of the company led the city to seek an independent water charter, and the legislature to grant it. However this may be, the existence of these facts, admitted by the stipulation, is enough to sustain the statute of 1893 as an exercise of the police power for the protection of the health and safety of the inhabitants of the city; and there is sufficient authority for the support of the statute upon this ground.

Fertilizing Co. *v.* Hyde Park, 97 U. S. 659, 667.
Mugler *v.* Kansas, 123 U. S. 623, 664.
N. Y. & N. E. R. R. *v.* Bristol, 151 U. S. 556, 567, and cases cited.

Pearsall *v.* Great Northern Railway, 161 U. S. 646, 665, and cases cited.
Wabash R. R. Co. *v.* Defiance, 167 U. S. 88, and cases cited.
Chicago, etc., R. R. *v.* Nebraska, 170 U. S. 57, 72, and cases cited.
Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1, 15.
Leovy *v.* United States, 177 U. S. 621, 636.

IMPAIRMENT OF THE OBLIGATION OF CONTRACTS. SPECIFICATIONS OF ERROR VII–IX.

We understand from counsel that the broad claim of an implied contract, excluding competition, resulting from the legislation, etc., as set out in paragraphs 3, 4 and 6 of the bill (Record, pp. 1-3), which was not raised in the Circuit Court, will not be raised here. Probably it is not open. The facts that the city in 1878 and 1879 was granted a water charter and declined to accept it, and aided in obtaining the company's charter in 1880, are objected to as irrelevant and immaterial (see Stipulation, par. 1; Record, p. 87); the city declined to answer these averments, for impertinence (Record, p. 60); the company excepted to the answer for this insufficiency (Record, pp. 73, 74); and subsequently withdrew its exceptions (Record, p. 91). If the claim is open, the cases are conclusive against it, especially the Skaneateles case, 184 U. S. 354; and the Joplin case, 191 U. S. 150.

The only thing remaining to be considered under this head is the offer of evidence that the hydrant contract was not valued or included in the award, for the purpose of laying a foundation for the claim of impairment of its obligation. There are several reasons why the evidence cannot be received nor this claim maintained.

I.

1. If the company's conveyance of its property is held voluntary in law, the claim of impairment of contract falls, of course, with the claim of a taking of property. It is clear beyond dispute that no contract, property or right of the company was touched or affected in any degree by Sts. 1893 or 1894, or both, unless and

until the company chose to sell its property to the city, except that it was exposed to possible competition; and the law is settled that a competing charter does not impair the obligation of a non-exclusive charter or contract. The company could have stood its ground, kept all its contracts, property and franchises unimpaired, and gone on with its business, subject only to the risk of competition, and the city would have had to make the payments called for by the hydrant contract. (See the Bienville case, 186 U. S. at p. 222.) If the company chose the alternative of sale voluntarily, there is an end of any claim of impairment of contract. This is waiver or abandonment of the contract; not impairment of it.

Lovell *v.* St. Louis Ins. Co., 111 U. S. 264, 274.

2. And if it is not held as matter of law that the contract was waived or abandoned, the question remains whether it was waived or abandoned in fact; upon which see "Additional Grounds," *ante*, par. I, p. 22. If this issue is found against the company, there is an end of this claim.

3. In this connection it is also to be considered whether the contract was not terminated by force of its express provisions, if not technically waived or abandoned. The period of the contract is uncertain. The company agrees to "furnish said city water as hereinafter provided unless sooner terminated by the purchase of its property" by the city, "in accordance with section 11 of chapter 235 of the Acts of 1880" (its charter); further that it "will furnish and maintain a full supply of water for fire purposes during the existence of this contract;" and, further, "It is agreed that *said term of twenty years* shall begin" not later than Jan. 1, 1882. This is the only mention of twenty years, and it is only thus inferentially, if at all, that twenty years is the period of the contract. Apart from the question whether the company's sale was voluntary, it may be claimed that its proceedings, in conveying and parting with possession of its property under the statute and thereby disabling itself from further performance, were enough to terminate the contract; so that it cannot thereafter be said to be in "existence," in the sense of its terms. (Contract, Exhibit D; Record, pp. 26, 27.)

II.

If the sale were not to be held voluntary, or the contract waived, abandoned or terminated, the only contract question remaining open under the bill, if any, is whether "said act of 1894 and said act of 1893, as re-enacted by said act of 1894," impaired the obligation of the hydrant contract. (Record, pp. 14*a*, 15*c*.)

On the face of the statutes, plainly they did not reach or affect the contract at all, except to authorize competition, which does not impair its obligation.

If it be assumed, as contended, that the contract was *taken*, it is settled that the taking of a contract does not impair its obligation, if proper provision is made for compensation.

Long Island case, 166 U. S. 685.

The company tries to lay a foundation for this claim of impairment by offering, after the principal question of a taking of property was heard and decided against it, the testimony of the valuation commissioners that they did not in fact value the hydrant contract with the other property, being of opinion that it could not in law be valued; it being agreed, subject to competency, that they would so testify. (Record, pp. 94, 128, 129.)

The Circuit Court excluded the testimony, as immaterial and ineffectual if admitted, on the grounds (1) that what was done or omitted by the commissioners could not make the statutes unconstitutional; and (2) that all the proceedings had already been adjudged voluntary on the part of the company. (Record, pp. 128, 129.)

The latter ground is clearly conclusive against the admission of the testimony, for the reasons given by the Circuit Court and other reasons above stated in paragraph I.

Equally so is the former. Conceding that a construction of the statute by the Supreme Judicial Court, giving it effect to impair the obligation of the hydrant contract, would have presented a Federal question, reviewable by this court on writ of error (New Orleans Water Works Co. *v.* Louisiana, 185 U. S. at p. 350), no construction or misconstruction of it by these commissioners lays any foundation for this claim of impairment, or gives the Circuit Court any ground of jurisdiction or of relief under this bill. The remedy for that was to be sought in the State court, on the ques-

tion of acceptance of the award. It was not sought, nor was the point alluded to. (Stipulation, Record, p. 94.) This claim is a mere afterthought, and presents no real Federal question cognizable by the Circuit Court.

"If the commissioner's conclusions were erroneous, the courts were open for the correction of the error, and the possibility that they might agree with the commissioner could not be laid hold of as tantamount to an actual controversy as to the effect of the Constitution."

Arbuckle *v.* Blackburn, 191 U. S. 405, 415.

See also the cases cited under head of "Jurisdiction," *ante*, p. 6.

III.

The testimony offered is essentially incompetent, and, being offered subject to competency, could not be received, under the terms of the stipulation. (Record, p. 94.)

The commissioners were quasi-judicial officers. The complete and conclusive evidence of their doings is their written award filed in court under the requirement of the statute. (St. 1894, § 1; Record, p. 34; Award, Record, p. 9.) This award cannot be varied, qualified or explained by parol evidence, especially as it is now accepted by and merged in the judgment of the court accepting it. The only exception to this rule is that a referee or arbitrator may testify whether a particular claim was in issue before him, when that is doubtful upon the record; which is not this case. (See Stipulation, Record, p. 94.) A judge cannot be called as a witness to vary or impeach the record of his judgment. If authority is wanted for so plain a proposition, see

Legg *v.* Legg, 8 Mass. 99.
Ward *v.* Gould, 5 Pick. 291.
Gay *v.* Welles, 7 Pick. 217.
Withington *v.* Warren, 10 Met. 431.
Chappell *v.* Hunt, 8 Gray, 427.
Sparhawk *v.* Twitchell, 1 Allen, 450.
Monk *v.* Beal, 2 Allen, 585.
Packard *v.* Reynolds, 100 Mass. 153.
Alexander *v.* McNear, 28 Fed. 403.
Buccleugh *v.* Metropolitan Board of Works, L. R. 5, H. L. 418, 457, 462.

According to this rule, it must now be conclusively presumed that the commissioners did value the contract, if the company was in law entitled to have it valued. In this view, no foundation remains for the claim of impairment. This is settled by

Long Island Water Co. *v.* Brooklyn, 166 U. S. 685.

IV.

If the proffered testimony is regarded as admitted, it establishes nothing to the purpose. While it appears that the commissioners omitted to value the contract for some reason of law, it does not appear that they construed St. 1894 as excluding it, or that their exclusion of it had any relation to that statute; which, therefore, is not thereby shown to have impaired, or been construed to impair, the obligation of the contract. (Stipulation, Record, p. 94.)

V.

The bill does not allege, and the record does not show, that the company distinctly asked the commissioners to value the contract, or furnished any evidence enabling them to value it: indeed, it shows the contrary. It shows also that "in the proceedings in the State court upon the report of the commissioners the company made no claim that the contract should be or had not been valued, and raised no question concerning it." (Stipulation, Record, p. 94.)

VI.

It is clear that the question of fact whether the contract was or was not valued is not a Federal question.

It is equally clear that the fact that the contract was not valued, if proved, does not establish that the statute impaired its obligation. The omission to value the contract cannot be ascribed to the statute, unless that was its necessary effect.

The statute here in question did not take or authorize the taking of the contract at all. There was, therefore, no occasion to expressly provide compensation for it.

The attempt is to lay a foundation for the claim of impairment, by saying that the statute and the proceedings under it amounted to a taking of the contract, and by showing further that the contract was not in fact valued.

But if the statute and the proceedings under it amounted to a taking of the contract, it does not follow that the statute failed to provide just compensation for it. Just compensation was provided for the contract, if it was part of the property which the company was entitled to sell and to be paid for. The condition of St. 1894, is, in effect, that the city shall buy and pay for all the company's property, except its franchise rights. The exception does not include the contract. If the contract was in law a part of the property for which the company was entitled to be paid, the statute provided payment for it. The company does not, and could not, complain that it was not to be valued by a jury.

Long Island Water Co. *v.* Brooklyn, 166 U. S. 685, 695.
Backus *v.* Fort Street Depot Co., 169 U. S. 557, 569.

There was, then, no failure to provide just compensation for the contract, even if the statute is regarded as a taking of it; and accordingly, no impairment of its obligation by the statute.

VII.

Apart from all minor questions, and whether the contract must or must not be presumed to have been valued if entitled to valuation, and treating the rejected offer of evidence as equivalent to proof, the claim of impairment of contract is groundless and frivolous.

The question, reduced to its lowest terms, stated most favorably for the company, is, whether one whose property, including a contract, has been taken under a State statute and valued by proceedings in a State court, who raised no question there concerning the contract, claimed no impairment of it, made no suggestion that it was not valued, or that it was improperly valued, and even failed to distinctly claim that it should be valued at all (see Stipulation, Record, p. 94), can thereafter maintain in a Circuit Court of the United States a bill in equity to set aside the proceedings, on the ground that the statute impaired the obligation of the contract, by showing that it was not in fact valued.

More shortly, this question is simply whether one whose contract has been taken under a State statute, and, by his own neglect, not valued in the award of compensation in the State court, can thereafter claim to have the proceedings set aside by a Circuit Court of

the United States, on the ground that the statute impaired the obligation of the contract.

It cannot be necessary to discuss such a pretension further. Every principle of the law of laches, waiver and estoppel is directly against it. Upon the authorities cited above, such a claim is not within the jurisdiction of the Circuit Court.

SPECIFICATIONS OF ERROR X–XI.

These specifications are for general error in dismissing the bill, and call for no further answer.

ALBERT E. PILLSBURY,
GEORGE H. O'CONNELL, *City Solicitor,*
for the City of Newburyport, Appellee.

GLOUCESTER WATER SUPPLY COMPANY, APPELLANT,

v.

CITY OF GLOUCESTER, APPELLEE.

No. 183.

STATEMENT.

In this case, as in the Newburyport case, *ante*, the appellant is attempting to avoid its own sale of its water works to the appellee city, under the same circumstances and upon the same grounds. The case is essentially the same as the Newburyport case, except that certain minor questions in that case do not arise here; and except that, as this case was disposed of below on demurrer, the question is whether the facts alleged in the bill, taken as a whole, show any Federal right for enforcement of which the company is now entitled to invoke the original jurisdiction of the Circuit Court.

The appellant company, being engaged in supplying the city of Gloucester and its inhabitants with water under a non-exclusive charter (Mass. St. 1881, c. 167; Exhibit A, Gloucester Record, p. 19) and a non-exclusive hydrant contract with the city (Exhibit E, Record, p. 27), sold its water works to the city under Mass. St. 1895, c. 451 (Exhibit K, Record, p. 48). This statute authorized the city to supply itself and its inhabitants with water, on condition of first purchasing the company's property if offered. The purchase clause of this statute (section 16, Record, p. 53), so far as material, is believed to be the same in legal effect as that in the Newburyport case.

After the sale of its property to the city according to the provisions of the statute, the company petitioned for the appointment of commissioners to value it, and tried its case before them. (Record, p. 11.) The commissioners awarded the company $600,500.

Objections of both parties to the award were heard by a single justice, and were reserved for and heard by the full bench of the Supreme Judicial Court (Record, pp. 16, 17), and the award was accepted for the sum of $576,544, with interest. (Record, p. 87.)

Gloucester Water Supply Co. *v.* Gloucester, 179 Mass. 365.

In these proceedings the company raised no Federal or other constitutional question.

Thereupon the company filed in the Circuit Court of the United States the bill from dismissal of which this appeal is taken, in substantially the same form and upon substantially the same grounds as in the Newburyport case; alleging that St. 1895 impaired the obligation of its contracts, and that the statute and the proceedings under it amounted to a taking of its property without due process of law, as its franchise rights to take additional water sources, to lay pipes in the streets and to charge water rates were not paid for; and deprived it of the equal protection of the laws; in violation of the 14th Amendment; praying a decree that St. 1895, c. 451, be adjudged unconstitutional; that the city has taken and holds the property in violation of the company's rights under the Federal Constitution, and for general relief. (Record, pp. 1–19.)

The city demurred to the bill for want of jurisdiction; want of equity; failure to disclose any impairment of the obligation of contracts, deprivation of property without due process of law, or denial of the equal protection of the laws; laches, in omitting to raise any Federal question in the proceedings in the State court; and estoppel to review or revise the proceedings in the State court. (Record, pp. 87, 88.)

The Circuit court heard the case on the bill and demurrer, after the decision of the Newburyport case; held that it was governed by that case; sustained the demurrer, and dismissed the bill. (Record, pp. 89, 92.)

These questions, appearing in the Newburyport case, do not arise in the Gloucester case: —

1. While in the Newburyport case two statutes are involved, with a question whether the earlier took effect, there is but one statute here in question, St. 1895, c. 451.

2. In this case there is no question arising out of non-valuation of the hydrant contract, as it was valued by the commissioners and included in the award.

3. In this case there is no such evidence as that presented in the Newburyport case to sustain the statute as an exercise of the police power for protection of the public health and safety.

SUBMISSION ON THE NEWBURYPORT BRIEF.

This case is fully covered by the argument and authorities in the Newburyport brief. All the grounds of objection there presented to the jurisdiction of the Circuit Court, to the company's right to resort to this remedy after electing to proceed under the statute, or to invoke the Circuit Court to review and set aside the proceedings in the State court, apply equally to this case, for the same reasons.

Upon the merits, the reasons assigned for affirming the decree in the Newburyport case are equally conclusive in this case. The bill asserts the same claim, of a taking of property without due process of law, and impairment of the obligation of contracts, upon the same grounds, and upon facts almost identically the same and of the same legal effect.

All the decisive elements of that case (except the misconduct of the company in polluting its water supply) are present and are equally decisive in this case. The company had no exclusive charter or contract; it was within legislative power to authorize competition by the city; there was no unlawful compulsion or duress; the company's conveyance of its property was therefore voluntary in law, if not also in fact; and there was no taking of property or impairment of the obligation of contracts.

There are the same reasons in this case for holding the conveyance voluntary in fact, if not in law; from which the same result follows.

The reserved power of the State over corporate charters applies equally to this case, and with the same effect, except that no particu-

lar misconduct of this company appears as a ground of exercise of the power.

The claim of impairment of the obligation of contracts, in this case, lacks even the foundation on which it is put forward in the Newburyport case; as in this case the contract was duly valued by the commissioners and included in the award. (Record, pp. 12, 16.)

PRELIMINARY GROUNDS OF DISMISSAL OR AFFIRMATION.

In this case the appellee city submits that the bill should have been dismissed by the Circuit Court for want of jurisdiction, and that the decree should now be reversed for the purpose of ordering such dismissal, for the reasons and upon the authorities presented in the Newburyport brief, *ante*, under the heads "Jurisdiction of the Circuit Court," p. 4, and "Waiver of the Federal Question and Estoppel by taking the benefit of the Statute," p. 6.

It is further submitted that the bill might properly have been dismissed below, and that the decree should now be affirmed, or reversed for the purpose of dismissal, for the reasons and upon the authorities given in the Newburyport brief, *ante*, under the heads "Waiver and Estoppel by Election of Remedy," p. 8, and "The Bill is in the Nature of a Bill of Review, or Appeal," p. 10.

DEPRIVATION OF PROPERTY. SPECIFICATIONS OF ERROR I.–VI.

Upon the main question of deprivation of property without due process of law, raised by Specifications of Error I.–VI., the city submits this case upon the argument and authorities upon this question, under the same head, in the Newburyport brief, *ante*, p. 14.

It is to be noted that in this case the Massachusetts court declares the company's franchise to be non-exclusive; that the grant of a franchise to the city was no violation of the franchise rights of the company; and that the sale was not obligatory upon the company. (Record, p. 85.)

Gloucester Water Supply Co. *v.* Gloucester, 179 Mass. 365, 381.

It is also to be noted that, while the company attempted to convey its franchise rights to the city, by describing and including them in the specification (Record, p. 76, item 40), the statute cannot be deemed to authorize conveyance of the franchise rights (St. 1895, § 16, Record, p. 53); and the city, before voting the purchase, notified the company that it did not admit the correctness of the description, and that the vote would be upon the purchase of the property described in the statute, and not otherwise. (Record, p. 91.) It is agreed that these facts may be taken with the same effect as though they were set out in the bill. (Record, p. 89.) In the Newburyport case, where the purchase clause was the same in effect so far as material to this point, the Massachusetts court held that the city acquired its franchise rights directly from the State, and not from the company; in which view the company's franchise rights did not pass to the city by the statute or conveyance. It must be the same in this case.

Newburyport Water Co. *v.* Newburyport, 168 Mass. 541, 553.

The same reasons exist in this case as in the Newburyport case for holding the conveyance voluntary in fact, upon the face of the bill; and the city submits this contention upon the argument under that head in the Newburyport brief, *ante*, p. 22.

Also that St. 1895 here in question is sustainable as an exercise of the reserved power over corporate charters, for the reasons and upon the authorities submitted in the Newburyport brief, under the head "The Reserved Power over Corporate Charters," *ante*, p. 23, The reserving statute in force when this company's charter was granted in 1881 is the same as in the Newburyport case (Mass. Gen. St. 1860, c. 68, § 41), *ante*, p. 23.

IMPAIRMENT OF CONTRACTS. SPECIFICATIONS OF ERROR VII., VIII.

We understand from counsel that the broad claim of an implied contract, excluding competition, resulting from the legislation, etc., as set out in the bill (Record, pp. 2-5), will not be asserted or argued. The authorities cited by the Circuit Court, and in the Newburyport brief, *ante*, pp. 20, 28, are conclusive against it.

The only remaining question is of impairment of the obligation of the hydrant contract. (Exhibit E, Record, pp. 27-31.) This was the only contract in existence at the time of the purchase, and had then about a year to run. (Record, pp. 11, 25, 28.)

It cannot be claimed that this is an exclusive contract. The clause of the company's charter under which it was made (charter, section 4; Record, p. 20) does not authorize an exclusive contract, at least as against action of the State; and the contract is non-exclusive in terms. The only promise of the city is to make the stipulated payments. There is no agreement not to seek or obtain another water supply.

As this contract was duly valued by the commissioners and included in the award (Record, pp. 12, 16), there can be, in any view of the case, no claim of impairment of its obligation. The Long Island case, 166 U. S. 685, is conclusive upon this.

For the rest, the city submits the contract question upon the argument and authorities in the Newburyport brief, under head "Impairment of the Obligation of Contracts," *ante*, pp. 28–30, 33, 34.

SPECIFICATIONS OF ERROR IX., X.

We understand from counsel that no claim will be made of denial of the equal protection of the laws.

SPECIFICATIONS OF ERROR XI.–XIV.

These are for general error in sustaining the demurrer and dismissing the bill, and call for no further comment.

ALBERT E. PILLSBURY,
CHARLES A. RUSSELL,
for the City of Gloucester, Appellee.

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Supreme Court of the United States.

No. 182.—October Term, 1903.

The Newburyport Water Company, Appellant, vs. The City of Newburyport. } Appeal from the Circuit Court of the United States for the District of Massachusetts.

[April 4, 1904.]

The Newburyport Water Company, appellant, is a Massachusetts corporation created by special act on April 23, 1880, which act was subject to alteration, amendment or repeal at the pleasure of the legislature.

As authorized by its charter, the water company established a water supply system in the city of Newburyport. On August 17, 1880, the water company entered into a contract with the city to furnish water, for fire puposes, during a term of twenty years, with the privilege to the city of purchasing the waterworks property after the expiration of ten years.

In the year 1893 the legislature passed an act, (chapter 471,) conferring power upon the city, if sanctioned by popular vote, to provide its own water plant, to supply itself and its inhabitants with water, and, if also approved by the voters, to acquire by agreement with the water company its plant. The voters of the city, however, decided not to purchase the plant, but to establish and maintain an independent water supply system. On June 14, 1894, an act, designated as chapter 474, was passed by the legislature, forbidding the city of Newburyport, in the event that the water company, within thirty days after the passage of the act, elected to offer its property for sale to the city, from acting under the authority of chapter 471 of the acts of 1893, unless the city first purchased the plant of the company. A copy of the act is inserted in the margin.*

* Chapter 474.

An act to provide for the purchase of the property of the Newburyport Water Company by the City of Newburyport.

Be it enacted, etc., as follows: Sec. 1. If, within thirty days after the passage of this act, the Newburyport Water Company shall notify the mayor of the city of Newburyport, in writing, that it desires to sell to said city all the rights, privileges, easments, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water, said city shall not proceed to supply water to itself or its inhabitants under the authority of chapter four hundred and seventy-one of the acts of the year eighteen hundred and ninety-three, unless it shall have first purchased of said company the property aforesaid; and said company is authorized to make sale of said property to said city, and said city is authorized to purchase the same. Whenever said

Availing themselves of the privilege conferred by this act, the stockholders of the water company voted to sell to the city, and served notice to that effect upon the mayor. The city, by a popular vote, decided to buy.

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city shall, by a majority vote of the legal voters of said city present and voting thereon at a meeting called for that purpose, vote to purchase said property, notice of the desire of said company to sell the same having been given as hereinbefore provided, said company shall, within twenty days after the vote aforesaid, execute and deliver to said city proper deeds and instruments in writing, conveying to said city the property aforesaid, and said property thus conveyed shall thereupon become the property of said city, and said city shall pay to said company the fair value thereof, to be ascertained as hereinafter provided. If at the first meeting a majority of the voters present and voting do not vote to purchase said property, other meetings may be called and held therefor. In case the said city and the said company shall be unable to agree upon the value of said property, the Supreme Judicial Court, shall, upon application of either party and notice to the other, appoint three commissioners, two of whom shall be skilled engineers and the third learned in the law, who shall determine the fair value of said property for the purposes of its use by said city, and whose award, when accepted by the court, shall be final. Such value shall be estimated without enhancement on account of future earning capacity or good will, or account of the franchise of said company.

SEC. 2. In case said Newburyport Water Company shall convey its property to the city of Newburyport, in accordance with the provisions of the preceding section, said city shall manage and use the property thus conveyed for the purposes and under the provisions of chapter four hundred and seventy-one of the acts of the year eighteen hundred and ninety-three.

SEC. 3. The said city may, for the purpose of paying the necessary expenses and liabilities incurred under the provisions of this act, issue from time to time bonds, notes or scrip to an amount sufficient for such purpose; such bonds, notes or scrip shall bear on their face the words "Newburyport water loan," shall be payable at the expiration of periods not exceeding thirty years from the date of issue, shall bear interest payable semi-annually at a rate not exceeding six per centum per annum, and shall be signed by the treasurer of the city and countersigned by the water commissioners provided for by chapter four hundred and seventy-one of the acts of the year eighteen hundred and ninety-three. The said city may sell such securities at public or private sale, or pledge the same for money borrowed for the purposes of this act, upon such terms and conditions at it may deem proper, provided that such securities shall not be sold for less than the par value thereof. The city shall provide at the time of contracting said loan for the establishment of a sinking fund, and shall annually contribute to such fund a sum sufficient with the accumulations thereof to pay the principal of such loan at maturity. The said sinking fund shall remain inviolate and pledged to the payment of said loan, and shall be used for no other purpose.

SEC. 4. In case said city shall, in violation of section one of this act, proceed to supply itself or its inhabitants with water before making the purchase aforesaid, the Supreme Judicial Court shall, upon petition of said company, have jurisdiction in equity to enjoin said city from so doing until it shall have made such purchase.

SEC. 5. This act shall take effect upon its passage.

Approved June 14, 1894.

The water company thereupon, on January 20, 1895, executed and delivered to the city a deed of all its property, both corporeal and incorporeal. In accepting the deed, however, the city served upon the water company the notice printed in the margin.*

Under the deed of the water company the city took possession of the plant. The parties being unable to agree as to the sum to be paid, the water company petitioned the Supreme Judicial Court for the county of Essex, to appoint three commissioners to fix the amount, which was done. Hearings were had and the commissioners made an award of $275,000, but no allowance was made for the franchise or right of the water company to lay and maintain pipes in the streets and for its right to collect water rates or for the profits which the company might have made on the contract for furnishing water to the city for fire purposes, had not the sale of the plant to the city taken place It is stipulated by counsel that the commissioners did not value such contract, "it being their opinion that the same in law could not be valued," and that although the water company offered the contract before the commissioners "no evidence of the quantity of water supplied to the city under the contract, nor any direct evidence of the cost of performing the contract or of its value to the company," was introduced. The stipulation also recites—

"That counsel for the city in his closing argument asked counsel for the water company if he had waived the claim to have the contract valued, and the latter replied that he did not waive it, and was not prepared to say what use he should make of it. That thereupon counsel for the city proceeded to argue that the contract should not be valued; that the counsel for the water company in his closing argument mentioned the contract as one of the items of property which the company had parted with to the city, and urged, but not in this connection, that it was the duty of the commissioners to estimate the value of all of the property of the company as one whole."

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*To the Newburyport Water Company:

In accepting the conveyance made to the city of Newburyport by the Newburyport Water Company, dated January 29, 1895, and delivered to the mayor on that day by the clerk of that corporation for examination, it is not admitted, on behalf of the city, that any franchise is acquired by the said city under such conveyance, or that the city is under any obligation to make payment on account of any franchise of said corporation by reason thereof.

It is further not admitted or claimed that the four filters, with their gates, pipes, appliances and appurtenances, described in item 2 of said deed as situated upon the second lot of land described in item 1 therein, are used in supplying said city or its inhabitants with water, or that the city is bound to pay for the same or any part thereof.

It is further not admitted or claimed that the Newburyport Water Company has any right or authority to convey by said conveyance, or the city Newburyport to accept or make payment for anything whatever, except according to provisions of chapter 474 of the act of 1894.

Adopted by a unanimous yea vote, six aldermen present and voting.

The report on the award made by the commissioners was heard before a single justice of the Supreme Judicial Court, who reserved for the full court whether the award should be recommitted or be accepted. The full court affirmed and accepted the award of the commissioners. (168 Mass. 541.) A rehearing was applied for, but while the petition was pending the water company brought the present suit in equity in the Circuit Court of the United States for the District of Massachusetts. After the bringing of such equity suit the petition for rehearing was dismissed.

In the bill of complaint the foregoing facts, except as to the recited provisions referred to as embraced in the stipulation, were set out with much amplitude, and it was alleged that no claim was made before the commissioners or in the State courts (except in the petition for rehearing) that the act of 1894 was repugnant to the Constitution of the United States.

In substance, the grounds for relief propounded in the bill were that as the act of the legislature which gave the privilege to the water company to sell had been construed by the Supreme Judicial Court as not entitling that company, on the sale by it made to the city, to compensation for its franchises and other valuable incorporeal rights, that act as construed amounted to a taking of the property of the water company, against its consent, without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States. The bill based this contention upon the charge that as the legislative act which gave the company the privilege to sell to the city, if it chose to do so, was coupled with the right conferred upon the city, if the company did not sell, to erect a water plant of its own, the sale by the company was compulsory, since the execution by the city of the authority to erect its own plant would have worked the ruin of the water company. In addition, it was charged in the bill that the failure under the legislative act, of which the company had availed itself, to value the future profits which the company might have derived from its contract to furnish the city with water, impaired the obligation of the contract arising from the charter, in violation of the contract clause of the Constitution of the United States. Charging that it was the intention of the city to issue bonds for the purpose of raising funds with which to pay the award in question, the bill prayed an injunction and the appointment of a receiver to manage the property claimed by the water company, which it had conveyed to the city, until the controversy was finally determined. The ultimate and substantial relief sought by the bill was, first, a restoration to the water company of the property which it had conveyed to the city, with damages for its detention, and in the alternative that full compensation be awarded. The city, appearing specially for the purpose, moved to dismiss for want of jurisdiction. This, after hearing, was overruled. Thereupon a demurrer was filed to the bill, which, after argument, was overruled.

Application was next made for a rehearing on the demurrer, and pending action thereon an answer and replication were filed. The application for a rehearing on the demurrer was overruled. A motion was then made for leave to file a special demurrer to that portion of the bill and prayer in which a right to a decree for compensation was asserted. This was refused, and thereafter, by consent of parties, the following order was made by the court:

"*Ordered:* That the constitutional question, to wit, whether or not the plaintiff has been deprived of its property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, be first heard; and that all questions as to plaintiff's relief, if any, (including questions of valuation of the property alleged to have been taken), await the determination of the constitutional question."

Soon afterwards a hearing was had upon the question referred to in said order, and the decision of the court was adverse to the water company. (103 Fed. Rep. 584.) After this the court heard argument upon the contention of the water company that the act of 1894 impaired the obligation of its contract with the city, and in consequence violated section 10 of article I of the Constitution of the United States. It was decided that the failure to value the contract in question "does not tend to prove that the act of 1894 was repugnant to the contract clause of the Constitution." The court having thus decided all the constitutional questions raised by the water company against that company, entered a final decree dismissing the bill. This appeal, directly to this court, was then taken.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

At the threshold we are met with the objection, raised below and urged at bar, that the Circuit Court was without jurisdiction, because the bill on its face did not state a case arising under the Constitution or laws of the United States, within the intendment of the act of August 13, 1888. (25 Stat. 433.) As the case is here on direct appeal from the decree of the Circuit Court of the United States, the solution of this question necessarily involves also deciding whether the cause was properly brought to this court. As the existence of the constitutional question is the only basis of the right to the direct appeal, if there was no such question in the court below there was and is no such issue by which the direct appeal to this court can be sustained. Under these circumstances, if the contention as to want of jurisdiction of the court below, arising from the alleged absence of constitutional questions, be well founded, our duty is not simply to dismiss the appeal, but to reverse the decree below with instructions to the Circuit Court to dismiss the bill for want of jurisdiction. (*Defiance Water Company* v. *Defiance*, 191 U. S. 184.)

If jurisdiction is to be determined by the mere fact that the bill alleged constitutional questions, there was, of course, jurisdiction. But that is not the sole criterion. On the contrary, it is settled that jurisdiction does not arise simply because an averment is made as to the existence of a constitutional question, if it plainly appears that such averment is not real and substantial, but is without color of merit. (*Underground Railroad* v. *City of New York*, not yet reported; *Arbuckle* v. *Blackburn*, 191 U. S. 405; *Owensboro* v. *Owensboro Water Co.*, 191 Ib. 358; *Defiance Water Co.* v. *Defiance*, 191 Ib. 184; *Swafford* v. *Templeton*, 185 Ib. 487; *McCain* v. *Des Moines*, 174 Ib. 168, 181, and cases cited.) Whether the Constitution of the United States was and is, in a real and substantial sense, involved depends upon apparently two considerations: First, the proposition that the sale made by the company to the city was compulsory, and hence there was a taking of the property in disregard of due process of law; and, second, that the failure of the commissioners to value the future profits arising from the contract for the furnishing for fires of a water supply to the city impaired the obligations of the company's contract. We say apparently two, since the questions are virtually one, depending both on the same considerations.

Now, it is conceded that the charter of the water company was not exclusive, and was subject to repeal, alteration or amendment at the will of the legislature. This being the case, it is evident that no deprivation of property without due process of law or impairment of the obligations of a contract did or could arise from the act of the legislature empowering the city to erect its own waterworks. Having this power, the legislature could therefore have exercised it without compelling the city to buy the plant of the water company, and the bill proceeds upon the theory that if this right had been exerted by the legislature the company would have been ruined, and the value of its property in effect entirely destroyed. This follows, because the averments are based upon the assumption that the conveyance by the company of its property to the city was not voluntary, since, if it had not so conveyed, the exercise by the city of the right to construct its own plant would have destroyed the company's property. The contentions, therefore, as to the Constitution of the United States are based solely upon the proposition that because the legislature sought to protect the company and save its property from ruin by conferring upon it the privilege of selling its property to the city, if it chose to do so, thereby compulsion and consequent violation of the Constitution of the United States arose. In other words, that because there was conferred a benefit upon the corporation, which the legislature need not have bestowed, and which the company availed of, that its property was taken from it forcibly and without its consent. When the contention is thus reduced to its ultimate analysis, it comes to this—that the property of the company was taken from it with-

out its consent, because by the action of the legislature, for the benefit of the company, it was enabled to sell its plant to the city and thus escape a serious loss. Indeed, in reason, the theory upon which the bill is based could not be maintained without deciding that the company had an exclusive contract, and therefore that there was a want of power in the legislature to authorize the city to erect its own plant; or, what is tantamount thereto, declaring that, although there was no exclusive right and therefore power in the legislature, to give the city the right to erect its own plant, that body must have abstained from the exercise of its lawful authority, unless it determined to exert it so as to destroy and ruin the company. The power being in the legislature, it was competent for that body to exert it for the benefit and in the interest of the water company, to enable that company, if it chose to sell its plant upon the terms stipulated, and thus avoid the loss which otherwise, the bill avers, would have been entailed. And these considerations take this case out of the reach of the authorities which are relied upon as establishing that one cannot enforce a contract benefit derived from or advantage gained over another, by coercing his will by means of threats, even of the doing of a lawful act. The advantage resulting from the power conferred upon the company to sell enured to its benefit, since it saved it from a ruin which otherwise would have been occasioned. No compulsion in any legal sense can be said to have been exerted on the company by the option given it, because the exercise by the company of the option, upon its own theory of the case, saved its property from destruction. To indulge in the assumption that the action of the company was not voluntary would require the assumption that the company would have willingly suffered a most grievous wrong when, by accepting as it did the benefits of the act, such consequences were averted. The Supreme Judicial Court of Massachusetts, in passing upon the award made by the commissioners, aptly said (168 Mass. 554):

"It must be remembered that the transaction before us springs out of a voluntary offer by the petitioner to sell upon the statutory terms, and therefore there is no reason to try to bend those terms in its favor. Of course, an offer by a water company made under the threat of municipal competition and to avoid ruin, might be voluntary only in name. But we have no reason to assume in this case that the petitioner is the victim of robbery, and must treat it as having acted of its free choice in fact as well as in form."

It is to be observed that in the legislative act which the company accepted, and in furtherance of which it voluntarily conveyed its property to the city, it was expressly stipulated that the value of such property "should be estimated without enhancement on account of future earning capacity or good will, or on account of the franchise of said company." It is also worthy of note that before the State courts the only question presented for consideration was the proper interpretation of the statute in ques-

tion, and whether or not it provided for payment for certain incorporeal rights and franchises which the water company contended should have been allowed for by the commissioners. Having accepted the statute, conveyed its property to the city, provoked the State proceedings to value the property and derived the benefits resulting from the legislation of the State of Massachusetts, the water company may not now, because of disappointment at the result of the interpretation which the statute received at the hands of the State court, change its position and cause its voluntary acceptance to become an involuntary one in order to assail the constitutionality of the legislation in question.

Concluding, for the foregoing reasons, that the rights asserted in the bill under the Constitution of the United States, upon which the jurisdiction of this court depends and upon which also the jurisdiction of the lower court depended, were so attenuated and unsubstantial as to be absolutely devoid of merit, our duty is to direct that the decree of the Circuit Court be reversed at appellant's costs, and that the case be remanded to that court with instructions to dismiss the bill for want of jurisdiction.

And it is so ordered.

17602

Supreme Court of the United States.

No. 183.—October Term, 1903.

The Gloucester Water Supply Company, Appellant, *vs.* The City of Gloucester.	Appeal from the Circuit Court of the United States for the District of Massachusetts.

[April 4, 1904.]

Mr. Justice White delivered the opinion of the Court.

In the main, this case is like that of *Newburyport Water Company* v. *The City of Newburyport*, just decided.

The Gloucester Water Company was engaged in supplying the city of Gloucester and its inhabitants with water under a non-exclusive charter and a non-exclusive hydrant contract made with the city. Under the authority of a statute enacted in 1895, similar in tenor to the act of 1894 considered in the Newburyport case, the Gloucester company sold its plant to the city of Gloucester. After the sale the company petitioned for the appointment of commissioners to value the property. Objections were made by both parties to the award, and the objections were reserved for consideration to the full bench of the Supreme Judicial Court of Massachusetts. That court accepted the award for the sum of $576,544 with interest. (179 Mass. 365.) Thereafter the present suit in equity was instituted in the Circuit Court of the United States for the District of Massachusetts, the bill filed containing substantially similar allegations to those made in the Newburyport case. Similar relief was also sought, except that there was no claim that the commissioners had not made an allowance for the unexpired term of the hydrant contract. After the decision in the Newburyport case the Circuit Court sustained a demurrer and dismissed the bill on the merits.

For the reasons stated in the opinion delivered in the Newburyport case, the decree of the Circuit Court is reversed at appellant's costs, and the case remanded, with instructions to dismiss the bill for want of jurisdiction.

True copy.

Test:

Clerk Supreme Court, U. S.